89-1182
No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JACK J. GRYNBERG and CELESTE C. GRYNBERG,
Petitioners,
v.
PAUL DANZIG, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

May full faith and credit and res judicata effect be accorded to a state court class action judgment awarding money damages to absent plaintiffs over whom the state court did not assert jurisdiction upon the claim resulting in judgment as required by the Due Process Clause?

May full faith and credit and res judicata effect be accorded to a state court holding of jurisdiction over judgment holders absent a finding that the jurisdictional issue was fully and fairly litigated in the state court?

Whether, consistent with *State of Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950), federal courts may refuse to inquire into the fundamental fairness of procedures underlying a state court judgment by giving substantive weight to this Court's denial of a petition for writ of certiorari and treating that denial as a ruling on the merits?

Whether the federal courts, without inquiry into the quality, extensiveness and fairness of procedures in the judgment court, may deny application of this Court's directly applicable and governing holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and accord full faith and credit to a money damage judgment in favor of absent plaintiffs over whom the court exercised jurisdiction in a manner violative of the jurisdictional prerequisites enunciated in *Phillips?*

Upon enforcement of a state court judgment, may a challenge to the jurisdictional and due process underpinnings of that judgment be avoided by giving preclusive effect to a state appellate holding that class-action defendants had waived non-jurisdictional defects, when (1) no inquiry is first made into the fundamental fairness of the state court waiver ruling; (2) governing precedent of this Court

is not applied; (3) the Circuit Court expanded the non-jurisdictional waiver holding of the state court to include and preclude defendants' constitutional, jurisdictional objections to the judgment; (4) the defendants were held by the state court to have waived only their right to object to improprieties in class certification and not to the absence of jurisdictional post-certification notice and opt-out procedures; (5) the state court held that the lack of notice to absent class members, required to comport with due process, was harmless error; (6) the alleged waiver is of rights of plaintiffs, not waivable by class-action defendants; and (7) the only rights waivable by the class-action defendants arose at judgment, and as such, cannot be waived by conduct prior to judgment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF STATUTES

TABLE OF OTHER AUTHORITIES

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Petitioners Jack J. Grynberg and Celeste C. Grynberg ("Grynbergs" or "Petitioners") pray that a writ of certiorari issue to review an Order and Judgment of the United States Court of Appeals for the Tenth Circuit (the "Circuit Court") affirming the judgment of the United States District Court for the District of Colorado.

OPINIONS BELOW

At this date, the Order and Judgment of the Circuit Court has not been published and is set forth beginning at page A1 of the Appendix. The Opinion of the District Court which was affirmed and made a part of the Circuit Court Order and Judgment begins at page A5. The Judgment entered upon the District Court's Opinion begins at page A21. The Order denying Petitioners' motion for rehearing in the Circuit Court is at page A22, and a technical modification of that Order is at page A24. The Order of the Bankruptcy Judge which was affirmed by the District Court was not published. The Order of the Bankruptcy Judge is set forth beginning at page A25, and the Judgment entered thereon is set forth at page A41.

JURISDICTION

The names of each of the Respondents who are affected by this Petition are set forth in the Appendix hereto at page A49.

The Circuit Court entered its Opinion and Judgment on April 3, 1989 and denied a rehearing on May 3, 1989. This Petition is filed within 90 days of May 3, 1989. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law * * *.

Section 1738, Title 28, United States Code, provides, in pertinent part:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

A. Proceedings On and Background of the Bankruptcy Claims at Issue.

In February 1981, the Grynbergs filed separate petitions under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§101, *et seq.*, in the United States Bankruptcy Court for the District of Colorado. Record on Appeal ("ROA") p. 279. The Grynbergs' Joint Plan of Reorganization, providing for payment in full of all allowed claims, was confirmed by the Bankruptcy Judge on April 21, 1982. ROA p. 253.

Among the claims filed against each of the Grynberg bankruptcy estates were those of 60 persons (the "Bankruptcy Claimants"), in whose favor a class action money judgment (the "California Judgment") was entered against the Grynbergs by a California state court in 1980.[1] Appendix ("App.") p. A27; ROA p. 268. Four of the Bankruptcy Claimants were named plaintiffs in the California action, and the balance were absent plaintiffs (the "Absent Plaintiffs"). The class action was instituted and all Absent Plaintiffs were certified as a class upon 5 claims for declaratory relief, claims of the kind assertable under Fed. R. Civ. P. Rule ("Rule") 23(b)(2).[2] All of the class-wide

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1. The California Judgment was entered in December 1980 against the Grynbergs in the Alameda County (California) Superior Court in the amount of $6,311,912.86, plus $431,081.06 in punitive damages against Jack J. Grynberg alone. ROA p. 269.

2. The Supreme Court of California has directed the California courts to utilize Rule 23 in class actions of the kind underlying the California Judgment. *City of San Jose v. Superior Court of Santa Clara County*, 12 Cal.3d 447, 453-454, 115 Cal.Rptr. 797, 801, 525 P.2d 701, 705 (1974); *Vasquez v. Superior Court of San Joaquin County*, 4 Cal.3d 800, 821, 94 Cal.Rptr. 796, 809, 484 P.2d 964, 977 (1971); *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 734, 433 P.2d 732, 742 (1967).

claims affirmed a limited partnership agreement among the parties and sought interpretation of that agreement and recovery for the partnership. Two other claims affected, and were certified to, less than all class members. The "Notice of Class Action" sent to Absent Plaintiffs detailed the 5 class-wide issues upon which all members of the class would be bound by any judgment, favorable or adverse. App. pp. A42-A48. The Notice also specified that the class members had no right to exclude themselves from the class on those issues. App. p. A45, ¶2.

More than three years later, on the eve of trial, the named plaintiffs obtained leave to amend their complaint to add a claim (the "Money Damages Claim") for fraud in the inducement of the partnership agreement, requesting rescissionary damages of $4,000,000, the aggregate amount of partnership subscriptions. Supplemental Record on Appeal ("SROA") p. 6. No Absent Plaintiff was notified of the Money Damages Claim or afforded any opportunity to opt out or participate in the trial of that Claim. App. pp. A2, A27. Prior to judgment, the Grynbergs were silent upon the issue of class status of the Money Damages Claim; the named plaintiffs also were silent; and the trial court took no action, *sua sponte*, regarding that status. App. p. A27, SROA pp. 6-7.

The California Judgment entered solely upon the Money Damages Claim. ROA pp. 268-282. The findings of fact and conclusions of law of the California trial court neither found nor concluded that the Grynbergs waived any rights respecting jurisdiction, class certification or otherwise. ROA pp. 397-419. In its conclusions of law, the California trial court held that there was a "proper class action" and the class was "appropriate" but made no specific finding that it had, or how it had acquired, jurisdiction over the Absent Plaintiffs or any party other than the Grynbergs. ROA p. 414, ¶¶ 1-2. The California Judgment (ROA pp. 268-282) does not "describe those to whom the notice provided in subdivision (c)(2) [of Rule 23] was

directed, and who have not requested exclusion" (Rule 23 (c)(3)) from the Money Damages Claim.

Each of the Bankruptcy Claimants filed substantially identical individual claims (the "Bankruptcy Claims") in the Grynberg bankruptcy cases claiming, alternatively, either (i) the damages awarded individually by the California Judgment or (ii) the enforcement of rights under the partnership agreement rescinded by that Judgment. ROA p. 188. The Grynbergs each promptly filed objections to the Bankruptcy Claims. ROA p. 388.

The Grynbergs' appeal of the California Judgment continued during their Chapter 11 cases, and proceedings on the Bankruptcy Claims were abated. The California Court of Appeal affirmed the California Judgment on November 21, 1984 and refused rehearing on December 19, 1984. *Danzig v. Jack Grynberg & Associates,* 161 Cal. App.3d 1128, 208 Cal.Rptr. 336 (1984), *cert. denied, sub nom. Grynberg v. Danzig,* 474 U.S. 819 (1985) (*Danzig*). The California Supreme Court denied hearing on February 14, 1985. On May 16, 1985, the Grynbergs filed a petition to this Court, No. 84-1784, seeking issuance of a writ of certiorari to the California Court of Appeal. On June 26, 1985, this Court announced its decision in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985) *(Phillips),* and, on August 17, 1985, the Grynbergs, relying on *Phillips,* filed their reply brief. The Grynbergs' petition for the writ was denied on October 7, 1985.

After denial of the writ, the Grynbergs amended their pending objections to the Bankruptcy Claims to assert, *inter alia,* that, contrary to the due process requirements of *Phillips,* no Absent Plaintiff was given notice or the right to opt out of the Money Damages Claim, with the result that jurisdiction was not properly asserted over the Absent Plaintiffs and the California Judgment was not

enforceable as a basis for the Bankruptcy Claims, ROA pp. 387-390.[3]

B. Rulings of the Bankruptcy Judge and the District Court.

The Bankruptcy Judge reviewed proceedings on the California Judgment and, by Order entered July 9, 1986, held that, because res judicata precluded consideration of the Grynbergs' due process challenges to that Judgment, the Bankruptcy Claims would be allowed without examining anything other than the Judgment. App. pp. A35-A36. The principal focus of the Bankruptcy Judge was whether the change in law enunciated by *Phillips* after California proceedings had ended constituted an exception to application of res judicata. The Bankruptcy Judge held that, while *Phillips* enunciated standards different from those underlying the California Judgment, res judicata remained a bar because the holding in *Phillips* "does not . . . rise to the degree of overall importance in our society which is necessary to avoid the preclusive effect of judgments." App. p. A34.

The District Court adopted the Bankruptcy Judge's conclusion regarding *Phillips*' lack of societal importance. App. p. A12. On the authority of *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982) *(Kremer)*, the District Court addressed the Grynbergs' due process objections.

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3. Based upon the constitutional invalidity of the California Judgment in favor of the Absent Plaintiffs, the Grynbergs sought hearing on their objections, including their claims that all Absent Plaintiffs signed sworn subscription agreements disclaiming reliance on any document other than a definitive partnership prospectus, impliedly held to be non-fraudulent; the document found to contain misrepresentations was a non-final, non-binding preliminary prospectus which, by law, was superseded and made ineffective as a basis for fraud by later versions not containing the statements held to be fraudulent; and no Absent Plaintiff had shown which, if any, of several prospectuses he had read or any reliance on the misleading, preliminary version. ROA pp. 388-389.

App. pp. A11-A12. The Court held that the California Judgment was not "fundamentally unfair" (App. p. A16) to the Grynbergs because (1) no notice of the Money Damages Claim was required since "[o]nly an amended complaint, involving causes of action arising from the same facts, but asserting different remedies was added [to the previously certified claims]" (App. pp. A16-A17); (2) *Phillips* was inapposite because the class-action defendant there made known its objections to class certification before trial, and "[n]othing in *Phillips* suggests that a Defendant may wait to raise pretrial objections until after an adverse judgment" (App. p. A15); and (3) the Grynbergs waived their due process challenge by their failure to make pretrial objections to the validity of the class status of the Money Damages Claim and other claims added by the amended complaint (App. p. A15).

C. The Ruling of the Circuit Court.

The Circuit Court affirmed "substantially" for the reasons given by the District Court (App. p. A3), adding:

> The Grynbergs unsuccessfully but fully developed and advanced their arguments through the entire direct appellate process, including a petition to the United States Supreme Court for a writ of certiorari. The judgment of the California trial court became final and entitled to *res judicata* effect. The powerful policies behind that doctrine are not affected in this case by the United States Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), a decision brought to the attention of the Supreme Court in the Grynberg's petition for a writ of certiorari. Even if we were inclined to look behind the final decision of the California courts, the issue of waiver would precede any collateral inquiry into

> the constitutionality of the class action or choice of law aspects of the state litigation. The California courts did not engage in a separate denial of due process by defining what conduct constituted a waiver, and their judgment that the Grynbergs waived the claims upon which they now rely is also entitled to *res judicata* effect.
>
> This court is the seventh forum in which the Grynbergs have pursued essentially the same arguments. The salutary purposes of the doctrine of repose have never been more evident.

App. pp. A3-A4.

Neither the Bankruptcy Judge, the District Court nor the Circuit Court acceded to the Grynbergs' request to inquire whether the California Judgment is constitutionally infirm under the holding in *Phillips;* each forum held that the doctrine of res judicata barred that inquiry.

REASONS FOR GRANTING THE WRIT

I.
SUMMARY OF REASONS FOR GRANTING THE WRIT

By this Petition, the Grynbergs assert due process rights protecting their property from a judgment in favor of persons over whom the California trial court did not properly assert jurisdiction with respect to the litigation of the Money Damages Claim. Consistent with the Due Process Clause and full faith and credit considerations under 28 U.S.C. §1738, a judgment issued without proper personal jurisdiction over an absent party is not enforceable by that party.

Holdings of this Court are the Law of the Land upon announcement and must be followed routinely by the lower courts to avoid endless appeals and an unmanageable Court docket. *Phillips* had been announced when the Grynbergs' challenge to the enforceability of the California Judgment was heard and had not been modified or withdrawn when the Circuit Court enforced that Judgment, one entered

without proper assertion of jurisdiction over the Absent Plaintiffs who, wholly contrary to *Phillips,* were not provided any opportunity to be heard on the Money Damages Claim, any opportunity to opt out of that Claim, or even any notice of the Claim at all. The Circuit Courts, as the courts of last resort in most cases, bear a high responsibility of obedience to decisions of this Court, especially where they may not like the result that such decisions may command.

This Court should grant the Grynbergs' Petition and exercise its supervisory jurisdiction because, contrary to decisions of this Court, the Circuit Court refused to follow *Phillips* by holding that res judicata prevented it from consideration of the effect of the due process standards of *Phillips* upon the ability of the Absent Plaintiffs to enforce the California Judgment.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE, BY REFUSING TO APPLY *PHILLIPS*, THE GOVERNING PRECEPT OF THIS COURT, THE CIRCUIT COURT EXCEEDED ITS JURISDICTION.

Phillips was announced after all proceedings on the California Judgment in California were closed and the Grynbergs' petition for certiorari had been filed. From the date of its announcement until reversed or modified by this Court, *Phillips* is binding upon all courts and governs both the exercise of jurisdiction of state courts over absent class-action plaintiffs and challenges to that jurisdiction in federal courts.[4]

4. There are exceptions to *retrospective application* of this Court's holdings. *See* e.g., *Northern Pipeline Const. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982) (where this Court so ordered); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-107 (1971) (setting standards to overcome a presumption of retrospectivity). The Grynbergs find no exception to the requirement that this Court's holdings be applied in cases heard after the announcement of a decision. Only this Court may reverse its own decisions. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).

Phillips held that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff . . . concerning a claim for money damages or similar relief at law" if it provides "minimal procedural due process protection," 472 U.S. at 811-812 (Footnote omitted). To exercise jurisdiction and satisfy due process, each absent plaintiff "must receive notice plus an opportunity to be heard and participate in the litigation" and "at a minimum . . . be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.* at 812.

Jurisdiction over the Money Damages Claim was not asserted over the Absent Plaintiffs in accordance with the *Phillips*' due process requirements; it is undisputed that no notice of the Claim was given and no opt out right or opportunity to be heard was accorded. App. pp. A7, A27-A28; *Danzig*, 161 Cal.App. 3d at 1137, n. 5, 208 Cal.Rptr. at 342, n. 5. The initial and only notice to the class specifies those claims upon which a judgment of the court would bind all class members. The Money Damages Claim was asserted more than 3 years later, is not described in the notice and did not enable class members to anticipate the California Judgment or any rights in it. App. pp. A44-A45.

The Due Process Clause protects "persons", not merely plaintiffs or just defendants *(Phillips*, 472 U.S. at 811), and prohibits a person not before the adjudicating court from being bound to an adverse judgment or benefitting from a favorable one.[5] Because the California Judgment

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5. *Phillips*, 472 U.S. at 805. *Accord*, Restatement (Second) of Judgments, §42 (1980) ("A person is not bound by a judgment *for or against a party* who purports to represent him if: (a) Notice concerning the representation was required to be given to the represented person, or others who might act to protect his interest, and there was no substantial compliance with the requirement.") (Emphasis supplied.).

was entered without affording the jurisdictionally requisite minimal due process protections to the Absent Plaintiffs, *Phillips* precludes an accord of full faith and credit under 28 U.S.C. §1738 to the California Judgment: "[A] judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to the party." 472 U.S. at 805.

The Bankruptcy Judge initially, and the District Court and the Circuit Court by adoption and affirmance respectively (App. pp. A34, A11-A12, A3), concluded that *Phillips* was insufficiently important to overcome the power of the doctrine of res judicata. The Grynbergs find no authority that this Court's due process rulings may be refused application in full faith and credit determinations because, upon some unspecified standard, they are considered unimportant.

The Circuit Court had no discretion but to apply *Phillips* to determine whether the California Judgment was constitutionally entitled to enforcement.[6] As demonstrated hereinafter, the Circuit Court's basis for refusing to apply *Phillips* equally ignores established precedent of this Court and equally exceeds the Circuit Court's jurisdiction.

This Court should grant the Grynbergs' Petition and remand this matter for redetermination in the light of *Phillips*.

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6. "[U]nless the inferior courts make a good faith effort to follow the decisions of the courts with jurisdiction to review their judgments, appeals would be endless. It is of particular importance at the Supreme Court level, for it sits primarily to settle the law, and if its decisions were not routinely followed, its docket would be wholly unmanageable." 1B Moore's Federal Practice, ¶0.402(1), p. 12, n. 15.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE CIRCUIT COURT FAILED TO FOLLOW HOLDINGS OF THIS COURT WHICH ARE PREDICATE TO AN ACCORD OF FULL FAITH AND CREDIT AND SO EXCEEDED ITS JURISDICTION.

A. The Circuit Court's Holding that the Grynbergs' Jurisdictional Challenge to the California Judgment Had Been "Fully Developed" and Is Therefore Res Judicata is Contrary to the Standard Set by this Court and Depends Entirely Upon An Improper Conclusion that the Denial of the Grynbergs' Prior Petition by this Court Was a Ruling Upon the Merits.

The Circuit Court refused to consider the Grynbergs' jurisdictional challenge to the California Judgment and to apply *Phillips* because Petitioners had "unsuccessfully but fully developed and advanced their arguments [or "essentially the same arguments"] through the entire direct appellate process, including a petition to the United States Supreme Court for certiorari" and, therefore, the California Judgment "became final and entitled to *res judicata* effect." App. p. A3, [A4]. The Circuit Court's standard for application of res judicata disregards established precedent of this Court.

First, only if careful inquiry reveals that a jurisdictional challenge was not only fully, but also *fairly*, litigated in the judgment court will res judicata bar further litigation of that issue in the enforcement court. *See Underwriters Nat. Assur. v. N. C. Life & Acc. Etc.*, 455 U.S. 691, 706 (1982) (*Underwriters*); *Durfee v. Duke*, 375 U.S. 106, 111 (1963) (*Durfee*) ("a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the

court which rendered the original judgment.")[7] Whether full and fair litigation has occurred depends, at a minimum, on whether the prior "state proceedings . . . satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." *Kremer*, 456 U.S. at 481; *Rider v. Pennsylvania*, 850 F. 2d 982, 991 (3d Cir. 1988). For this case, *Phillips* established those minimum procedural requirements which must have been be satisfied in the state proceeding if the California Judgment is to be accorded preclusive effect.

The Circuit Court did not consider whether, or hold that, the proceedings underlying the California Judgment were "fair." On its face, without more, the Circuit Court's application of res judicata, therefore, is invalid. Because neither the fullness nor the fairness of the California litigation should be determined without reference to *Phillips*, that omission cannot be remedied or deemed harmless.

Secondly, the Circuit Court improperly gave substantive weight to this Court's denial of the Grynbergs' prior certiorari petition. As it must, the Circuit Court recognized that consideration of *Phillips* in the prior litigation was necessary to any decision that the jurisdictional issue had been "fully developed . . . in the direct appellate process," stating:

> The powerful policies of [the res judicata] doctrine are not affected by the United States Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), a decision

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7. But, where a judgment is constitutionally infirm, a state court may not accord full faith and credit even to its jurisdictional rulings: "A State must . . . satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer*, 456 U.S. at 482 (Footnote omitted.).

> brought to the attention of the Supreme Court in the Grynberg's petition for a writ of certiorari.

App. p. A3. *Phillips* was announced after all proceedings in California had ended. Consequently, the Grynbergs' challenge to California's jurisdiction over the Absent Plaintiffs could have been fully and fairly litigated in the direct appellate process *only* if the denial of certiorari in *Danzig* constituted a ruling by this Court, on the merits, that California had properly asserted jurisdiction over the Absent Plaintiffs.[8] For decades, it has been indisputable that denial of a petition for writ of certiorari is not a ruling upon the merits. *State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) *(Baltimore)* ("[T]his Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review."); *cf. Hopfman v. Connolly*, 471 U.S. 459, 460-461 (1985). A grant of dispositive weight to the denial of certiorari was beyond the jurisdiction of the Circuit Court, however indispensable to its conclusion.

Moreover, the Circuit Court failed to analyze the change in the law made by *Phillips*. That change, from the viewpoint of the States was substantial. One-way intervention, "whereby a potential class member could await a resolution of the merits before deciding whether or not to join a lawsuit" was abrogated by the 1966 amendments to Rule 23(b)(3). *Peritz v. Liberty Loan Corporation*, 523 F.2d 349, 353 (7th Cir. 1975). In recognition of that change, this Court commented that Rule 23 was amended "to assure that members of the class would be identified before trial on the merits and would be bound by all sub-

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8. As further evidence that the Circuit Court gave substantive status to the denial of the Grynbergs' petition, the Circuit Court included this Court as among the seven courts in which "the Grynbergs have pursued essentially the same arguments." App. p. A4.

sequent orders and judgments." *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 547 (1974) (Footnote omitted). *Phillips* made applicable to the States, as due process requirements in multi-state class actions for money damages, the requirements for notice, opt out rights, and opportunity to be heard which were supplied by the 1966 amendments to Rule 23. On its face, *Danzig* makes manifest that the Absent Plaintiffs were allowed one-way intervention into the California Judgment, even though they were not bound to it, because of the absence of any notice of the Money Damages Claim. Any inquiry into the fairness of the California Judgment would reveal the constitutional magnitude of that defect after *Phillips*. Notwithstanding the clear contrary intent of the 1966 modifications to Rule 23, the Circuit Court has established precedent again permitting a scenario where, by being able to decide whether to opt in after judgment, absent plaintiffs cannot lose, and class action defendants can never win.

The Circuit Court, by ignoring fairness requirements and giving substantive import to a denial of certiorari, has effectively precluded any challenge, anywhere but here, to the California Judgment based on *Phillips*. In so doing and giving the California Judgment res judicata effect, the Circuit Court acted in disregard of the standards of this Court for determination of such matters.

B. The Circuit Court's Application of Res Judicata to Bar Inquiry into the Constitutional Issues Asserted by the Grynbergs is Contrary to Decisions of this Court.

As an additional basis for giving res judicata effect to the California Judgment, the Circuit Court held that:

> Even if we were inclined to look behind the final decision of the California courts, the issue of waiver would precede any collateral inquiry into

> the constitutionality of the class action or choice of law aspects of the state litigation. Those due process rights were waivable by the Grynbergs. The California courts did not engage in a separate denial of due process by defining what conduct constituted a waiver, and their judgment that the Grynbergs waived the claims upon which they now rely is also entitled to *res judicata* effect.

App. pp. A3-A4. Because a state court judgment is always subject to challenge upon jurisdictional grounds under the Full Faith and Credit Clause or 28 U.S.C. §1738, "a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment." *Phillips*, 472 U.S. at 805. The Circuit Court was required to look behind the final decision in California and may not apply res judicata to bar that inquiry. *Kremer*, 456 U.S. at 481-482, 481, n. 22 (1982). This Court consistently has required that a federal court may not give full faith and credit and collateral estoppel or res judicata effect to a state court judgment unless and until it inquires whether:

> (1) "controlling facts or legal principles have changed significantly since the state-court judgment", *Montana v. United States*, 440 U.S. 147, 155 (1979) *(Montana)*; and

> (2) a "full and fair opportunity to litigate the claim or issue has been provided" *(Kremer*, 456 U.S. at 480-481) or "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation" *(Montana, id.* at 164, n. 11).

The required inquiry contemplates the drastic impact res judicata may have upon constitutional rights and is reasoned upon fairness. *Brown v. Felson,* 442 U.S. 127 (1979).[9]

By giving preclusive effect to the California waiver holding (rendered without benefit of *Phillips),* the Circuit Court made no inquiry, much less a careful one.[10] The Circuit Court's procedure is precisely opposite to that required by the *Kremer* and *Montana* rules. An inquiry into jurisdiction must precede all other inquiries *(Underwriters, supra; Durfee, supra);* a waiver ruling cannot precede or preclude inquiry into jurisdiction. Similarly, a waiver ruling made in connection with a judgment which is void, is also void.

Moreover, in failing to make the inquiry mandated by this Court in *Kremer* and *Montana,* the Circuit Court abdicated its constitutional duty and permitted the California courts to govern federal prerogatives. This Court has stressed that "it is for federal law, not state law, to prescribe the measure of credit which one state shall give to another's judgment." *Thomas v. Washington Gas Light Co.,* 448 U.S. 261, 271, n. 15 (1980). Further, "[t]o vest the power of determining the extraterritorial effect of a

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9. "Because res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It is therefore to be invoked only after careful inquiry." *Id.* at 132.

10. The California Judgment is defective, under Rule 23(c)(3), on its face; it does not, and of course, could not reflect that any notice of the claim resulting in the Judgment was given or record who, after receipt of that notice, may have opted out of the claim. In *Young v. Katz,* 447 F.2d 431, 435 (5th Cir. 1971), where a judgment was deficient for those same reasons, the court remanded for correction of the deficiency.

State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Id.*, 448 U.S. at 272. The California appellate waiver holding was clearly intended to bolster the absence of any finding or conclusion in the trial court regarding its jurisdiction over Absent Plaintiffs, and that holding is not entitled to any weight. *Id.*, 448 U.S. at 271, n. 15.

The Circuit Court's unquestioning adoption of the California waiver ruling, to precede and preclude the jurisdictional and constitutional inquiry required by *Underwriters, Durfee, Kremer, Montana* and *Brown*, impermissibly gives "extraterritorial effect" and constitutional magnitude to the California appellate court's ruling.

C. The Circuit Court's Enforcement, Without Inquiry, of the California Appellate Waiver Holding Allows An Impermissible Assertion of Jurisdiction Over Absent Plaintiffs Upon Entry of Judgment to Which the Grynbergs Promptly Objected.

As demonstrated above, a waiver holding supplementing a constitutionally infirm judgment may never preclude subsequent due process review to determine the res judicata effect of that judgment. Nevertheless, because the Circuit Court did not describe or analyze the nature of the waiver which it used to prevent inquiry into California's jurisdiction and because the suggestion of waiver often risks immediate prejudice, the Grynbergs will show that the waiver holding of the California Court of Appeal, adopted by the Circuit Court, (1) did not adjudicate and could not have adjudicated the Grynbergs' due process objections and (2)

even given res judicata effect, would not preclude consideration of the Grynbergs' due process challenge to the California Judgment.

Where it is urged that due process rights have been waived, the well-established policy of this Court mandates that a detailed inquiry is required and that the bar of waiver is to be imposed with great care. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) *(Aetna)* ("[C]ourts indulge every reasonable presumption against waiver."); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) *(Fuentes)* ("[A] waiver of constitutional rights in any context must, at the very *least*, be clear.") (Emphasis in original). Claims of waiver and the due process infirmities they may mask both require the same careful inquiry before full faith and credit and res judicata effect may be accorded to a judgment challenged as constitutionally infirm. If, after inquiry, the holding of waiver is given effect, that effect cannot be expanded to include waivers of other rights not adjudicated by the earlier ruling.

Contrary to the ruling of the Circuit Court, the California Court of Appeal did not hold that the Grynbergs waived any "due process" rights. App. p. A4. The California appellate court held, "[o]nce the initial [class certification] determination has been made, a motion to decertify the class action may be used whenever changed circumstances render class status no longer appropriate" and "[w]e conclude that Grynberg's failure to move timely to decertify or recertify the class effectively waived any *objections to the class certification*, based on a claim of changed circumstances." *Danzig*, 161 Cal.App. 3d at 1136-1137, 208 Cal.Rptr. at 341 (Emphasis supplied). Consistent with *Aetna* and *Fuentes*, the waiver declared in California is a holding that the Grynbergs waived objections to "class certification," and no more.

The Circuit Court's erroneous expansion of the actual waiver holding to include due process rights may have been based on, and certainly was magnified by, its incorporation of the District Court opinion. The District Court materially, incorrectly described the class certification waiver holding: "[t]he California Court of Appeals specifically found that once a class action has been certified, and notice sent to all members (as occurred in the *Danzig* action), the defendant waives pre-trial objections to the *adequacy of that notice* if he does not assert them prior to the trial." App. p. A16 (Emphasis supplied).

The California Court of Appeal, as quoted by the District Court, instead held that the Grynbergs' waiver of class certification rendered it "unnecessary to discuss Grynberg's related due process and notice arguments." *Danzig*, 161 Cal.App. 3d at 1137, 208 Cal.Rptr. at 341 (Footnote omitted). Contrary to the District Court's analysis, that holding is not a finding that the Grynbergs waived their due process objections. Rather, the California Court of Appeal held that the failure to send notice of the Money Damages Claim was harmless error: "since the judgment was returned in favor of the class, none of whose members earlier chose to opt out, the *error* — if any — in *failing* to provide additional notice *was clearly harmless*. *Danzig*, 161 Cal.App. 3d at 1137, n. 5, 208 Cal.Rptr. at 341, n. 5 (Emphasis supplied).[11] Certification of a class does not provide jurisdiction; jurisdiction over absent plaintiffs is established only by the best practicable notice.[12]

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11. That the procedural due process to be accorded in a case depends upon or is measured by who wins or loses on the merits is an extraordinary, unprecedented holding and another indication of the basic unfairness underlying the California Judgment.

12. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) ("But when notice is a person's due, process which is a mere gesture is not due process."); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) ("[I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case."); *Phillips*, 472 U.S. at 811-812.

Giving preclusive effect to the California waiver holding did not and could not have precluded the Grynbergs' due process challenge to the California Judgment. The California appellate court's holding that the Grynbergs waived their right to object to class certification meant only that the Money Damages Claim was certified as appropriate for class adjudication and, at most, precluded the Grynbergs from later objecting that the Rule 23(a) and (b) prerequisites to a class action had not been met.

The distinction between class certification procedures, which are not jurisdictional, and post-certification procedures, on which jurisdiction is based, is central to and dispositive of the Circuit Court's error. *Phillips* does not deal with class certification questions; it deals with the post-certification obligations of state courts and class representatives. After certification of a state class action money damage claim, the best possible notice to the absent plaintiffs, a grant to them of opt-out rights on a form to be returned and advice of their right to be heard are *mandatory* and *jurisdictional* requirements under the Due Process Clause. *Phillips*, 472 U.S. at 811-812. The predicate for this Court's due process prerequisites to state court jurisdiction is to be found *only* in the *post*-certification conduct required of the named plaintiffs and the trial court. *Id.*

Only the named plaintiffs, who had the absolute right and the duty *(Id.*, 472 U.S. at 810) to assure jurisdiction over the Absent Plaintiffs by complying with post-certification procedures, risked the jurisdictional defect, a failing especially egregious where Rule 23 was, even then, so clear. *See* n. 2, *supra*. A new notice was both mandatory and jurisdictional.[13] The Grynbergs had no duty to give that

13. It has long been established that a change in the nature of a class action may require new notice to absent plaintiffs. *Cf., Zenith Laboratories, Inc. v. Carter-Wallace, Inc.*, 64 F.R.D. 159 (D.N.J. 1974), *aff'd*, 530 F.2d 508 (3d Cir. 1976), *cert. denied*, 429 U.S. 828 (1976); *Matarazzo v. Friendly Ice Cream Corp.*, 70 F.R.D. 556 (E.D.N.Y. 1976)). If analysis of amendments to class action complaints indicates that *Phillips'* requirements must be met, a new notice to absent plaintiffs will not place any burden upon the courts or class representatives other than that the Constitution requires.

notice and expand upon the number of plaintiffs in the action; only the named plaintiffs had any duty they could ignore or right they could waive. Only upon entry of the Judgment in favor of the Absent Plaintiffs, over whom jurisdiction had not been properly asserted, were the Grynbergs' due process rights deprived; the Grynbergs' immediate and continuing objection to that deprivation is made clear by the Circuit Court. App. p. 4.

The California appellate court committed fundamental error by assuming, without *Phillips* to guide it, that notice to the Absent Plaintiffs of the Money Damages Claim was neither mandatory nor jurisdictional and that a failure to give notice and opt out rights could be harmless error or excused because a class had been certified. The Circuit Court had the guidance of *Phillips* but reached the same result. These assumptions are facially defective. "A litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court." *Torres v. Oakland Scavenger Co.*, ___ U.S. ___, 108 S.Ct. 2405, 2409, n. 3 (1988).

The California courts could not constitutionally hold that a mandatory and jurisdictional notice can be waived by the trial court or any party. The Circuit Court's grant of preclusive effect to the holding that mere class certification eliminates the need for post-certification proceedings is equally unconstitutional. The Circuit Court was required, but failed to make, the cursory inquiry which would have disclosed that mandatory, jurisdictional notice never was afforded to the Absent Plaintiffs and that the California appellate court had misjudged its jurisdiction, an error which can never be harmless.

The Grynbergs understand how the Circuit Court may have been influenced by the salutary effect of putting an end to litigation challenging a fraud judgment and understand as well that the adversary system does not guarantee

perfection. However, placing blame upon the Grynbergs for litigating too long in too many places is absolutely wrong. App. p. A4. This lengthy litigation should never have occurred; the class representatives merely had to send a notice, which the Record discloses they knew how to do. App. p. A42. That a court may assume jurisdiction over a person in disregard of his due process rights is an oxymoron, yet it is the predicate of all holdings affirming and granting full faith and credit to the California Judgment. Taking the Grynbergs' property by avoidance of or refusal to apply precedent, which this Court considered important enough to promulgate, is an inappropriate and impermissible price to exact because the Grynbergs would not easily forfeit their rights.

Notwithstanding concerns over the length of litigation, at the very least, the Circuit Court was required to make a good faith effort to obey the holdings of this Court. 1B Moore's Federal Practice, *supra*, n. 6. The Circuit Court's failure to make that minimal effort established precedent contrary to this Court's fundamental precepts and holdings of other federal courts which follow those precepts, in derogation of the rights of state class action defendants, all justifying the exercise of jurisdiction by this Court.

IV.

CONCLUSION

For the foregoing reasons, this Petition for the issuance of a writ of certiorari to the United States Court of Appeals

for the Tenth Circuit should be granted, and the case reversed and remanded for further consideration in the light of *Phillips*.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: JACK J. GRYNBERG, a/k/a JACK JAKOB GRYNBERG, a/k/a JACK GRYNBERG, a/k/a JACK GRYNBERG & ASSOCIATES,

Debtor.

JACK J. GRYNBERG,

Debtor/Appellant,

v.

PAUL DANZIG, LOUIS DEGAN, CARL ZWERNER and NORMAN J. LIPOFF, as Executor of the Estate of ROBERT RUSSELL, Deceased, individually and on behalf of all Members of the Certified Class in Danzig, et al. vs. Grynberg (The Danzig Class), CELESTE C. GRYNBERG,

Appellees,

Consolidated Case Nos.
87-2037
87-2043
87-2100

In re: CELESTE C. GRYNBERG, a/k/a CELESTE CONSTANCE GRYNBERG, a/k/a CELESTE GRYNBERG,

Debtor.

CELESTE C. GRYNBERG,

Debtor/Appellant,

v.

PAUL DANZIG, LOUIS DEGAN, CARL ZWERNER and NORMAN J. LIPOFF, as Executor of the Estate of ROBERT RUSSELL, Deceased, individually and on behalf of all Members of the Certified Class in Danzig, et al. vs. Grynberg (The Danzig Class), JACK J. GRYNBERG,

Appellees.

(District of Colorado)
(D.C. Nos. 86-F-2100
86-F-2147
86-F-2098
86-F-2099)

In re: CELESTE C. GRYNBERG, a/k/a CELESTE CONSTANCE GRYNBERG, a/k/a CELESTE GRYNBERG;

In re: JACK J. GRYNBERG, a/k/a JACK JAKOB GRYNBERG, a/k/a JACK GRYNBERG, a/k/a JACK GRYNBERG & ASSOCIATES,

Debtors.

PAUL DANZIG, LOUIS DEGAN, CARL ZWERNER and NORMAN J. LIPOFF, as Executor of the Estate of ROBERT RUSSELL, Deceased, and on behalf of all Members of th Certified Class in Danzig, et al. vs. Grynberg (The Danzig Class),

Appellants,

v.

CELESTE C. GRYNBERG and JACK J. GRYNBERG,

Debtors/Appellees.

ORDER AND JUDGMENT*

Before ANDERSON, McWILLIAMS and TACHA, Circuit Judges.

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*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Jack J. Grynberg and Celeste C. Grynberg objected to certain claims filed in the underlying bankruptcy proceeding contending that the California state court judgment upon which the claims are based is invalid on constitutional grounds. The essence of their contention is that the California court "had no jurisdiction over the absent plaintiffs [in a class action] which would support a nationwide money damages judgment in favor of any of them. Previous certification and notice of other claims confer no automatic class-action jurisdiction over a new, materially different money damages claim." Joint Opening Brief of Appellants at 13. They mount a further constitutional attack on the California trial court judgment on choice of law grounds. Additionally, the Grynbergs contend that a ruling by the California Court of Appeal that the Grynbergs had waived the foregoing claims was "so arbitrary and so fundamentally unfair as to deprive them of due process." *Id.* at 16.

Those and other arguments were rejected by the district court in a well-reasoned decision from which the Grynbergs take this appeal. After a careful review of the arguments and authorities presented to us by the Grynbergs, we affirm the district court substantially for the reasons articulated in its opinion below, a copy of which is attached and incorporated herein.

The Grynbergs unsuccessfully but fully developed and advanced their arguments through the entire direct appellate process, including a petition to the United States Supreme Court for a writ of certiorari. The judgment of the California trial court became final and entitled to *res judicata* effect. The powerful policies behind that doctrine are not affected in this case by the United States Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), a decision brought to the attention of the Supreme Court in the Grynberg's petition for a writ of certiorari. Even if we were inclined to look behind the

final decision of the California courts, the issue of waiver would precede any collateral inquiry into the constitutionality of the class action or choice of law aspects of the state litigation. Those due process and related claims were waivable by the Grynbergs. The California courts did not engage in a separate denial of due process by defining what conduct constituted a waiver, and their judgment that the Grynbergs waived the claims upon which they now rely is also entitled to *res judicata* effect.

This court is the seventh forum in which the Grynbergs have pursued essentially the same arguments. The salutary purposes of the doctrine of repose have never been more evident. The judgment of the district court is AFFIRMED, inclusive of its ruling from which the cross-appeal in docket No. 87-2100 is taken, since that appeal (No. 87-2100) is moot. Appellants' motion to supplement the record is GRANTED. Appellees' request for sanctions is DENIED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Action No. 86-F-2100
Bankruptcy No. 81 B 00821 C
JACK J. GRYNBERG,

Plaintiff,

v.

PAUL DANZIG, ET AL.,

Defendants.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Action No. 86-F-2147
Bankruptcy Action No. 81 B 00825 C
CELESTE C. GRYNBERG

Plaintiff,

v.

PAUL DANZIG, ET AL.,

Defendants.

OPINION

Sherman G. Finesilver, Chief Judge

These four bankruptcy appeals arise from two bankruptcy court rulings. The debtors, Jack Grynberg, and Celeste Grynberg (the "Grynbergs"), and certain creditors appeal various portions of the following bankruptcy court's orders: 1) order of July 9, 1986, allowing the claims of the Danzig class members; and 2) judgment of August 21, 1986, permitting the claims of the Danzig class members. The parties requested consolidation of the appeals. We permitted consolidation for purposes of oral argument. Finding that oral argument is not required, we make the following determinations AFFIRMING the bankruptcy court's decision.

BACKGROUND

The parties have been involved in a series of lawsuits that arose from the operation of an oil and gas limited partnership known as the Greater Green River Basin Drilling Program 72-73 ("GGRB"). In 1972, the Grynbergs, doing business as Jack Grynberg & Associates, made a public offering of shares in GGRB for the purpose of obtaining investors in oil and gas leases which they owned. The Grynbergs eventually sold the $4 million registered offering to approximately 55 limited partner investors. The largest number of investors were California residents.

Due to a variety of problems, including those related to recorded assignments of leases, certain investors brought suit against the Grynbergs on March 20, 1975 in the Alameda, California Superior Court.[1] The five named plaintiffs filed a class action suit individually and on behalf of all limited partners of GGRB. The original complaint set

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1. See *Danzig v. Grynberg & Associates*, 161 Cal. App. 3d 1128, 208 Cal. Rptr. 336 (1984), *cert. denied* 106 S.Ct. 67 (1985), for a more detailed description of the facts underlying the lawsuit.

forth seven causes of action against the Grynbergs.[2] The suit was certified as a class action suit, and notice of the class action was sent to the unnamed plaintiffs. None of the limited partners of GGRB opted out of the class. In 1979, three years after the original complaint was certified as a class action, the named plaintiffs moved to amend the complaint to add claims for rescission and for restitution on an alternative theory from that pleaded in the first seven claims. No notice of the amended complaint was given to the class.

The Alameda Superior Court permitted the amendments to the complaint. On February 14, 1980, the case went to trial as a class action. After a seven week trial, the court filed a statement of decision in favor of the plaintiff class on a rescission theory, and ordered plaintiffs to submit proposed findings of fact and conclusions of law. The defendants objected to each proposed finding and conclusion that supported class adjudication. They asserted that the adequacy of class representation was at issue if the court granted relief in the form of rescission. The trial court denied the defendants' objections. On December 18, 1980, findings of fact and conclusions of law were issued, specifically holding that a proper class action existed, and that the named plaintiffs adequately represented the class (the "Danzig judgment"). The Danzig judgment provided for restitution to the class in excess of $6,700,000.

The defendants, Grynbergs moved for a new trial, asserting that their due process rights had been denied. In their motion for new trial, they argued for the first time that 1) the trial court lacked jurisdiction to enter a class judgment because no notice of the amended complaint had been sent to the class; and 2) the trial court should have applied the law of the state of residence of each class

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2. See Bankruptcy Court Order of July 9, 1986, p. 2, for a description of the seven causes of action.

member to the person's cause of action, rather than applying California law to all plaintiffs. The trial court denied the motion for new trial.

In early 1981, the Grynbergs filed for bankruptcy under Chapter 11 of the Bankruptcy Code. The debtors also appealed the judgment of the California trial court to the California Court of Appeals. The trial court's decision was affirmed three years later in *Danzig v. Grynberg & Associates,* 161 Cal. App. 3d 1128, 208 Cal. Rptr. 336 (1984). The appellate court later denied a petition for rehearing. The California Supreme Court denied the Grynbergs' request for a hearing on February 14, 1985. The United States Supreme Court denied writs of certiorari. *Grynberg v. Danzig,* 106 S.Ct. 67 (1985).

After the proceedings in the California courts were completed, and before the United States Supreme Court denied certiorari, the Danzig claimants moved for allowance of their proofs of claims. The Grynbergs objected to the Danzig claimants proofs of claim based primarily on *Phillips Petroleum Co. v. Shutts,* 105 S.Ct. 2965 (1985), a case which had been decided while the petition for certiorari in *Danzig v. Grynberg* was pending before the Supreme Court. The parties stipulated to a continuance of the hearing on allowance of the claims until the Supereme Court made a decision. Upon denial of the petition, the Danzig claimants again moved for allowance of the petition, and the debtors objected. In its cogent order of July 9, 1986, the bankruptcy court allowed the Danzig claimants' proofs of claim for each member of the class, based upon the individual proofs of claim. On August 21, 1986, the bankruptcy court entered judgment in accordance with its July 9, 1986 order as follows:

> IT IS ORDERED AND ADJUDGED that the debtors' objections to allowance of the Danzig claims are denied. The claims shall be allowed

based on the individual proofs of claim of each member of the Danzig class and the class proof of claim, which is duplicative of the individual proofs of claim filed by the claimants, is disallowed.

The parties appeal various portions of the bankruptcy court's rulings. The debtor Jack Grynberg appeals from the bankruptcy court's denial of his objections to the Danzig claims in Action No. 86-F-2100. The debtor Celeste Grynberg raises a similar appeal in Action No. 86-F-2147. In Action No. 86-F-2098 and Action No. 86-F-2099, the Danzig claimants appeal only from that portion of the bankruptcy court's order denying the proof of claim filed on behalf of the Danzig class. They concede that if the individual proofs of claim are allowed, then the class proof of claim will be moot and should be stricken on that basis. Appellees' Reply Brief, filed on December 16, 1986, pp. 2-3.

ANALYSIS

The debtors contend that the bankruptcy court erred in finding they were estopped from objecting to the Danzig claimants' proofs of claim, based upon principles of *res judicata*. They further assert the Danzig judgment lacks fundamental fairness, and was entered in violation of their due process rights. The main issue in this appeal is whether *res judicata* applies to the Danzig judgment or whether the debtors may collaterally attack it.

A. Res Judicata

The proofs of claim permitted by the bankruptcy court are based upon the Danzig judgment, a judgment entered in favor of the Danzig claimants in the Alameda Superior Court. The judgment has been affirmed by the California Appellate Court. A hearing was denied by the California Supreme Court. Writs of certiorari were denied by the United States Supreme Court.

A denial of certiorari by the Supreme Court is not an adjudication on the merits insofar as the decision may affect persons not parties to the judgment. However, it does render the judgment final between the parties, and bars them from any further attack on it. *Dairy Distributors, Inc. v. Western Conference of Teamsters,* 294 F.2d 348, 352 (10th Cir. 1962), *cert. denied* 368 U.S. 988 (1962). Therefore, the Danzig judgment is final, and subject to the principles of *res judicata.*

Under the principles of *res judicata,* a final judgment on the merits in a prior suit involving the same parties or their privies precludes a subsequent suit upon the same cause of action. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979). *Res judicata* prevents the relitigation of all grounds for recovery or defenses that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. *Brown v. Felsen,* 442 U.S. 127 (1979). A state judgment which is final is *res judicata;* any subsequent attack upon that judgment is barred. *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Association,* 455 U.S. 691, 705-707 (1982); *Bolling v. City & County of Denver,* 790 F. 2d 67 (10th Cir. 1986); *Kiowa Tribe of Oklahoma v. Lewis,* 777 F. 2d 587 (10th Cir. 1985), *cert. denied* (107 S. Ct. 247 1986).

Even if a judgment is incorrect, the judgment is still final. As the court stated in *Collins v. City of Wichita,* 254 F. 2d 837, 839 (10th Cir. 1958),

> Litigation must end some time, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside. [citations omitted].

However, a state court judgment need not be followed if it is so fundamentally flawed that it violates the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Kiowa, supra.*

Thus, issues which have already been litigated and decided may not be relitigated after the judgment becomes final. The Alameda Superior Court and the California Appellate Court decided each of the issues raised by the Grynbergs. The Supreme Court denied certiorari. The Danzig judgment is now final. The California proceedings were not a violation of the Grynbergs due process rights. Therefore, it is appropriate to give *res judicata* effect to the California judgment.

The Grynbergs argue that exceptions to the application of *res judicata* should apply to prevent its application. This argument is based upon the decision rendered in *Phillips Petroleum Co. v. Shutts,* 105 S. Ct. 2965 (1985), a case decided while the petition for certiorari in *Danzig v. Grynberg & Associates* was pending before the Supreme Court. The debtors assert that *Phillips* constitutes a change in controlling case law regarding due process requirements in class actions. The debtors' contentions are unpersuasive. The bankruptcy court properly found that even assuming *Phillips* resulted in a substantial change in constitutional rights, this alone is insufficient to preclude application of *res judicata.* Bankruptcy Court Order of July 9, 1986, pp. 12-13.

A change in the law regarding a constitutional right does not preclude application of *res judicata,* unless continued enforcement of the previously entered judgment would result in the continuation of unconstitutional conduct or preclusion of rights. The cases cited by debtors in which this exception has been applied are not applicable to the case at bar. In *Stanley v. Missouri State Board of*

Law Examiners, 616 F. Supp. 142 (D. Mo. 1985), the issue was the *continuing* preclusion of plaintiff's right to practice law after similar residency requirements had been declared unconstitutional by the United States Supreme Court. The issue was the right of plaintiff to practice law in the future. *See also, e.g. Moch v. East Baton Rouge Parish School Board*, 548 F. 2d 594 (5th Cir. 1977), *cert. denied*, 434 U.S. 859 (1977) and *Parnell v. Rapides Parish School Board*, 563 F. 2d 180 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) (Both cases involved the validity of school reapportionment plans still in use after changes in constitutional standards.) The continuing deprivation of constitutional rights in the above cited cases are distinguishable from the case at bar, involving a money judgment. No continuing or future conduct is involved in this case. Further, public policies at issue in the above-cited cases, justifying an exception to the principles of *res judicata* are not present here. Therefore, an exception to *res judicata* is not applicable. The bankruptcy court correctly determined that *res judicata* applied to the Danzig judgment, and permitted the Danzig claimants' proofs of claim based upon the judgment.

B. Phillips Petroleum Company

Even if an exception to the doctrine of *res judicata* were applied, the *Phillips* decision does not require a finding that the Danzig judgment should be overturned. The Grynbergs argue that the decision rendered in *Phillips, supra*, changed the law of California from that applied in the Danzig judgment, and that therefore, the Danzig judgment should be overturned. This argument is flawed.

The *Phillips* decision involved a class action brought by gas company investors to recover interest on royalties which had been suspended, pending final administrative approval of a gas price increase. The final class consisted of 28,000 members from all fifty states, and several foreign countries. The main focus of the decision involved the

validity of the procedures used to certify the class. Instead of having an "opt in" procedure, whereby a potential class member could opt into the class, the plaintiffs used an "opt out" procedure. Thus, all investors in the gas company were automatically in the class, unless they opted out. The defendant gas company objected to the certification procedures in the trial court. However, the trial court certified the case as a class action. When judgment entered in favor of plaintiffs, the defendant appealed, contending that their due process rights had been violated by the certification procedures. The Supreme Court found that the defendant had standing to bring the suit, reasoning that:

> Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

105 S. Ct. at 2972. The Supreme Court also found that the certification procedure, providing for an "opt out" method, satisfied the defendant's due process rights. Finally, the Supreme Court held that to apply Kansas law to all plaintiffs, even though 97% of the plaintiffs had no contact with Kansas other than the lawsuit, was a violation of due process. Thus, the judgment of the Kansas Supreme Court was upheld insofar as it found jurisdiction over all of the plaintiffs, and reversed insofar as it held Kansas law was applicable to all claims.

The *Phillips* decision does not entitle the Grynbergs to a reversal of the Danzig judgment. *Phillips* found that class members must receive notice of the class action and that

the forum court must consider whether the law of the forum state or of the various states of residence of the class members should be applied. In *Phillips*, the defendant vigorously asserted their objections to the class certification procedures at the trial level, before an adjudication on the merits. This assertion of rights gave the plaintiffs the opportunity to cure any defects in the certification procedures. *Phillips* did not deal with the situation involved in this case. In the case at bar, defendants raised objections to class certification procedures only after trial on the merits and after an adverse adjudication. The California Court of Appeals found that the Grynbergs' failure to object to the certification procedures prior to trial resulted in a waiver of any defects in the procedures. The California Court of Appeals stated:

> Once the initial determination has been made [to certify a class action suit], a motion to decertify the class action may be used whenever changed circumstances render class status no longer appropriate. [citation omitted]. But a request for decertification must be made before a decision on the merits. [citation omitted].
>
> Herein, Grynberg registered no formal objections to the initial certification of the class. Indeed, he conceded that the action may be a "proper class action" while expressing concern only that divergent views within the class be represented. Nor did he move to decertify the class after the amendment to the complaint seeking rescission.
>
> Grynberg's challenge to the class certification was raised for the first time in his objections to the proposed findings of fact. His argument that the objections were timely since formal *judgment* had not yet been entered is unpersuasive.

> The very purpose in requiring pretrial determination of class issues is to avoid precisely what happened here: passive acquiescence to class certification awaiting results of trial, and if unfavorable, then belatedly attacking the class certification order as improper. [citations omitted]. We conclude that Grynberg's failure to move timely to decertify or recertify the class effectively waived any objections to the class certification based on a claim of changed circumstances. [Emphasis in original].

208 Cal. Rptr. at 341.

Thus, in the proceedings before the Alameda Superior Court, the class action was properly certified at the inception of the lawsuit. When an amended complaint was filed, the class was not renotified of the causes of action raised in the amended complaint. The defendants made no objection to the validity of the class action with respect to the amended complaint. Defendants objected only after an adverse judgment was entered. Since that time, defendants have raised the issue at each step of appeal. Nothing in *Phillips* suggests that a defendant may wait to raise pretrial objections until after an adverse judgment.

C. Waiver

The Grynbergs argue that "allowance of the Danzig claims solely on the basis of the Danzig judgment lacks fundamental fairness". Debtors Joint Opening Brief, filed on November 17, 1986, p. 16. They argue that the plaintiffs were not given the opportunity to opt out before trial, but rather, were given the opportunity after a trial to opt into a judgment in their favor. They further assert that the Tenth Circuit has recognized the impropriety of class certification after trial on the merits. *E. g. Horn v. Associated Wholesale Grocers, Inc.*, 555 F. 2d 270, 274 (10th Cir. 1977).

These arguments completely ignore the fact that the Danzig class action had been certified prior to trial. The only causes of action which plaintiffs did not receive notice of, were those in the amended complaint. The Grynbergs raised no objections on this point until after the trial court had indicated his intention to rule against them. Under the circumstances, it was the Grynbergs, rather than the plaintiffs, who have attempted to "opt out" of an unfavorable judgment. The California Court of Appeals specifically found that once a class action has been certified, and notice sent to all class members (as occurred in the *Danzig* action), the defendant waives pre-trial objections to the adequacy of that notice if he does not assert them prior to the trial. The California Court of Appeals stated:

> Finally, we discern no prejudice to Grynberg by reason of the failure to provide notice to the class of the amendment seeking the different *remedy* of rescission. Since plaintiff class received adequate notice of the original complaint alleging the same ultimate factual averments underlying the rescission theory of relief, separate lawsuits by individual members could not be successfully maintained. In any case, since the judgment was returned in favor of plaintiff class, none of whose members earlier chose to opt out, the error — if any — in failing to provide additional notice, was clearly harmless. [Emphasis in original].

208 Cal. Rptr. at 341-342 n. 5. The Danzig judgment is not fundamentally unfair to the debtors. The debtors should have raised their objections prior to an adverse adjudication. Once a class action has been properly certified, a defendant may not sit mute, invite pretrial procedural errors, and then raise objections to pretrial procedures only after an adverse decision is reached.

Debtors assert that the California courts unfairly shifted the burden to the debtors of moving prior to trial

for class certification; they assert the plaintiff has the burden of protecting absent class plaintiffs in a class action suit. This argument cannot prevail; the class action had been properly certified. The case was proceeding as a class action. Only an amended complaint, involving causes of action arising from the same facts, but asserting different remedies was added. If the debtors objected to class proceedings on those issues, objections should have been raised prior to trial. Both California Courts so found.

Debtors argue that they were precluded from litigating their contentions before the California courts "on procedural grounds." They further contend that no court has addressed the merits of their due process arguments. These contentions beg the very issues which were decided against them. The "procedural ground" was the issue of *waiver*. Debtors were not "precluded" from raising their contentions before the California trial court; they totally failed to raise them until after judgment was entered. Due process rights can be waived by a party if not timely asserted. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-704 (1981). Debtors' claims were fully and fairly heard. The Grynbergs arguments are an attempt to raise objections before the bankruptcy court and on appeal from the bankruptcy court's decision, by way of a collateral attack on the *Danzig* judgment. These are issues which they failed to assert before the California trial court. This is expressely what the doctrine of *res judicata* prohibits.

The Grynbergs argue that many federal courts have held that a material amendment to a previously certified class complaint requires recertification and new notice if class members are to be bound. *See, e.g., Zenith Laboratories, Inc. v. Carter Wallace, Inc.*, 64 F.R.D. 159 (D. N.J. 1974), *affirmed*, 530 F. 2d 508 (3d Cir. 1976), *cert. denied*, 429 U.S. 828 (1976); *Matarazzo v. Friendly Ice Cream Corp.*, 70 F.R.D. 556, 560, (E.D. N.Y. 1976).

These cases are distinguishable. In both cases the objections to the class certification procedures were raised prior to trial. The determination of the alleged insufficiency of notice was made in the class action itself.

Recertification of a class action is not required every time a complaint is amended. Practically speaking, class actions would be unnecessarily bogged down with procedural impediments if we were to follow the arguments of the Grynbergs on this point. Under the facts of this case, the California trial court did not make, and was not required to make a *sua sponte* determination that recertification was necessary. Further, since the Grynbergs failed to raise any objections to the previously certified class action, the matter was not even at issue until an adverse judgment against the Grynbergs was announced.

D. Choice of Law

Citing *Phillips, supra,* the debtors urge that the California courts violated their due process rights by arbitrarily applying the law of California to all of the Danzig claimants, rather than the law of the residence of each individual. However, the California approach to choice of law issues is very similar to that enunciated by *Phillips. Phillips* does not require that the law of the state of each class member's residence be applied to that person's claim; it requires that there be an initial determination of whether the forum has a substantial interest in applying its law or should apply the various laws of the states of residence of the absent class members. California applies a similar balancing test. *Hurtado v. Superior Court,* 11 Cal. 3d 574, 581, 114 Cal. Rptr. 106, 522 P. 2d 666 (1974). However, California does not permit a party to raise objections to the choice of law used by the trial court after judgment is entered. *See Estate of Patterson,* 108 Cal. App. 3d 197, 207, 166 Cal. Rptr. 435 (1980). The *Phillips* decision did not raise the issue of waiver.

D. Individual Proofs of Claim

The Danzig claimants appeal that portion of the bankruptcy court's determination which held that class proofs of claim are not permissible in bankruptcy proceedings. The Danzig claimants concede that if this Court finds that the individual proofs of claim are permissible, then their appeal is moot.

The bankruptcy court denied the Danzig claimants class proof of claim. However, based upon the Danzig judgment, the Danzig claimants' individual proofs of claims were permitted. The bankruptcy court stated:

> There is no provision of the Bankruptcy Code or Bankruptcy Rules that specifically authorizes the filing of a proof of claim on behalf of a class. To the contrary, to allow a representative of a class to file a claim on behalf of others would be inconsistent with 11 U.S.C. § 501 and Bankruptcy Rules 3001 and 3003 and should not be allowed. *See In re Baldwin-Limited Corp.*, 52 Bankr. 146 (Bankr. S.D. Ohio 1985), and *In re Computer Devices*, 51 Bankr. 471 (Bankr. D. Mass. 1985).

July 9, 1986 Order, p. 16. This Court is not persuaded that class proofs of claims are impermissible in a bankruptcy case when the claims are based upon a final judgment obtained in another court. Nevertheless, the issue is not dispositive, and need not be determined in this case. Thus, this Court finds the bankruptcy court properly permitted the Danzig claimants proofs of claim, based upon the individual claims.

After an independent review of the bankruptcy court's conclusions of law, the Court finds that they are substantially supported by the law. Further, the factual findings upon which the legal conclusions are based are amply supported by the record, and are not clearly erroneous. Accordingly,

IT IS ORDERED:

1) The Danzig claimants' appeals in Action No. 86-F-2098 and Action No. 86-F-2099, from the bankruptcy court's order denying the proof of claim filed on behalf of the Danzig class, are DENIED as MOOT. The bankruptcy court's order of July 9, 1986, and judgment of August 21, 1986 are AFFIRMED.

2) The debtor Jack Grynberg's appeal in Action No. 86-F-2100 is DENIED. The bankruptcy court's order of July 9, 1986, and judgment of August 21, 1986 are AFFIRMED.

3) The debtor Celeste Grynberg's appeal in Action No. 86-F-2147 is DENIED. The bankruptcy court's order of July 9, 1986, and judgment of August 21, 1986 are AFFIRMED.

4) Each party shall bear its own costs and attorney fees incurred on these appeals.

5) The Clerk of Court is DIRECTED to enter judgments in these cases, in accordance with this opinion.

Done this 19 day of June, 1987, in Denver, Colorado.

BY THE COURT:

Sherman G. Finesilver, Chief Judge
United States District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-F-2098

Bankruptcy No. 81 B 00825 C

PAUL DANZIG, et al

Plaintiffs

v.

CELESTE C. GRYNBERG and JACK J. GRYNBERG

Defendants

JUDGMENT

Pursuant to and in accordance with the Opinion entered by the Honorable Sherman G. Finesilver, District Judge, it is

ORDERED AND ADJUDGED that the decision of the Bankruptcy Court is affirmed.

DATED at Denver, Colorado this 19th day of June, 1987.

FOR THE COURT:

JAMES R. MANSPEAKER,
CLERK

By: _____
Stephen P. Ehrlich,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: JACK J. GRYNBERG, also known as Jack Grynberg, also known as Jack Grynberg, also known as Jack Jakob Grynberg

Debtor

JACK J. GRYNBERG and CELESTE C. GRYNBERG,

Appellants,

v.

PAUL DANZIG; LOUIS DEGAN; CARL ZWERNER, NORMAN J. LIPOFF, as Executor of the Estate of ROBERT RUSSELL, Deceased, individually and on behalf of all Members of the Certified Class in Danzig, et al, vs. Grynberg (The Danzig Class); CELESTE C. GRYNBERG,

Appellees.

87-2037
87-2043
87-2100

ORDER

Before Holloway, Chief Judge, McKay, Logan, Seymour, Moore, Anderson, Tacha, Baldock, Brorby, Ebel, McWilliams, Circuit Judges.

This matter comes on for consideration of Appellants' suggestion for rehearing en banc, which the court treats as a petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: JACK J. GRYNBERG, also known as Jack Grynberg, also known as Jack Grynberg, also known as Jack Jakob Grynberg

Debtor

JACK J. GRYNBERG and CELESTE C. GRYNBERG,

Appellants,

v.

PAUL DANZIG; LOUIS DEGAN; CARL ZWERNER; NORMAN J. LIPOFF, as Executor of the Estate of ROBERT RUSSELL, Deceased, individually and on behalf of all Members of the Certified Class in Danzig, et al, vs. Grynberg (The Danzig Class); CELESTE C. GRYNBERG,

Appellee.

87-2037
87-2043
87-2100

ORDER

Before HOLLOWAY, Chief Judge, McWILLIAMS, McKAY, LOGAN, SEYMOUR, ANDERSON, TACHA, BALDOCK, BROBRY and EBEL, Circuit Judges.

The court, upon its own motion, to correct a clerical error in its order filed May 3, 1989 denying rehearing in the captioned case, amends that order to show that Judge Moore did not participate in consideration of the petition for rehearing and suggestion for rehearing en banc.

Entered for the Court

ROBERT L. HOECKER, Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO IN BANKRUPTCY

In re JACK J. GRYNBERG, aka JACK JAKOB GRYNBERG, aka JACK GRYNBERG, dba JACK GRYNBERG AND ASSOCIATES, *Debtor.*	No. 81 B 00821 M
In re CELESTE C. GRYNBERG, aka CELESTE CONSTANCE GRYNBERG, aka CELESTE GRYNBERG, *Debtor.*	NO. 81 B 00825 M

ORDER ON MOTION TO ALLOW CLAIMS

The matter before the Court is the motion of certain creditors to allow their claims and the debtors' objections thereto. The subject claims are those of the Danzig claimants who are members of a certified class in a civil action filed in the Superior Court, County of Alameda, State of California, being *Danzig, et al. v. Jack Grynberg and Associates, et al.*, No. 462022-4. Five named plaintiffs, Paul Danzig, Louis Degen, Harold Goldenberg, Robert Russell and Carl Zwerner initiated the state court class action on March 20, 1975. The named plaintiffs filed the

action individually and on behalf of all limited partners of the Greater Green River Basin Drilling Program 72-73 Limited Partnership (the GGRB).

The Danzig complaint set forth seven causes of action against the defendants, Jack J. Grynberg and Celeste C. Grynberg, the debtors herein. The first four causes of action related to plaintiffs' purchases of limited partnership interests in the GGRB in which Jack Grynberg and Associates was the sole general partner. As part of their allegations, the plaintiffs asserted that the defendants had induced subscriptions to the limited partnership through fraudulent written misrepresentations and failed to make material disclosures concerning the GGRB. These causes of action sought to invalidate an amendment to the original partnership agreement. The fifth cause of action sought to enforce provisions of the original partnership agreement which allegedly required certain leases belonging to both or either Jack and Celeste Grynberg to be conveyed to the partnership. The sixth cause of action sought damages for breach of the partnership agreement. The seventh cause of action sought damages for breach of fiduciary duties by reason of the conduct of the general partner. The plaintiffs also requested punitive damages.

The named plaintiffs eventually asked the Court to certify the action as a class action. The action was so certified and notice was sent to the unnamed class plaintiffs. In 1979, three years after the original complaint was certified as a class action, the named plaintiffs moved to amend the complaint to allege three more causes of action and to seek new forms of relief. The eighth cause of action alleged that the defendants made fraudulent oral misrepresentations and asked for damages. The ninth cause of action incorporated the factual allegations of the eighth cause of action and requested rescission of the limited partnership agreement. The tenth cause of action asserted that if defendants were not obligated to contribute certain leases to the part-

nership, then there had been a lack of consideration to support the money paid by the limited partners. No notice of these amendments was given to the class.

The amendments to the complaint were permitted. The matter went to trial on February 14, 1980 as a class action suit. After a seven-week trial, the Alameda Superior Court found against the defendants Jack and Celeste Grynberg and awarded to the Danzig class a judgment for rescission of the limited partnership agreement and damages in an amount in excess of $6,700,000. The judgment set forth the pro rata share owed to each class member.

The Alameda Superior Court ordered plaintiffs to prepare proposed findings of fact and conclusions of law. After the proposed findings of fact and conclusions of law were submitted, the defendants filed objections to each finding and conclusion that supported class adjudication. They filed a brief contending that relief in the nature of rescission raised the question of the adequacy of class representation. They asserted that because the impact of rescission would necessarily be different on each member of the class, adequacy of representation for a class seeking damages may not be adequate representation for a class seeking rescission. The objections to the proposed findings of fact and conclusions of law were denied.

On December 18, 1980, the Superior Court issued its findings of fact and conclusions of law specifically holding that the representative plaintiffs adequately represented members of the plaintiff class and that the action was a proper class action. On December 22, 1980, a judgment for rescission and damages was entered.

The Grynbergs moved for a new trial and contended that their due process rights had been denied. They asserted that the trial court did not have jurisdiction to enter the judgment as a class judgment because no notice had been

sent to the class regarding the amended complaint. The Grynbergs also claimed that the trial court erred in failing to apply the law of the state of residence of each class member to that person's cause of action. The motion for new trial was denied.

The Grynbergs appealed the judgment of the trial court. The California Court of Appeals, on November 21, 1984, affirmed the trial court's decision, *Danzig v. Grynberg,* 161 Cal. App. 3d 1128, 208 Cal. Rptr. 336 (1984) and later denied a petition for rehearing. The California Supreme Court denied the Grynbergs' request for a hearing. The Grynbergs' petition for certiorari to the United States Supreme Court was denied on October 7, 1985.

The Danzig claimants now move to have their claims allowed based on the final judgment rendered in the California state action. The Grynbergs, through their objections to the Danzig claims, seek to collaterally attack the judgment of the Superior Court of California. Such attack is based primarily on the case of *Phillips v. Shutts,* 105 S. Ct. 2965 (1985) *(Phillips),* which was decided by the United States Supreme Court while the petition for certiorari in *Danzig v. Grynberg* was pending before it. The Grynbergs argue that, based on *Phillips,* the absent class members should have received notice of the decision in 1979 to amend the complaint to include the claim for rescission of the limited partnership agreement and should have, at that time, been given the opportunity to opt out of the case. Thus, the Grynbergs argue that the Superior Court lacked jurisdiction over members of the Danzig class who were not residents of California and who were not named plaintiffs.[1]

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1. The class included 39 unnamed members who were not residents of California, 10 residents of California who were unnamed and four named plaintiffs who were not residents of California. Only one California resident was a named plaintiff.

Further, based on *Phillips*, the Grynbergs object to the choice of law utilized by the trial court. They argue that the Superior Court, in failing to consider whether the law of California or the law of the state of residence of the respective class members should be applied, denied them their due process rights. As a result, the Grynbergs argue that the *Danzig* judgment does not satisfy the minimum conditions of due process and is not binding upon the absent class members. Therefore, the Grynbergs object to the *Danzig* judgment being used to form the basis of the *Danzig* claims in this Court.

In response, the Danzig claimants argue that *Phillips* does not affect the *Danzig* judgment. The claimants contend that because the California decision is final, this Court must afford *res judicata* effect to the state court determination and allow the claim on the basis of that judgment. Alternatively, the claimants argue that *Phillips* does not provide any basis for collateral attack on the California judgment. They argue that due process requirements were satisfied in the California action. Further, the claimants assert that the Grynbergs, by failing to timely object to the choice of law and the class notice prior to trial, waived any rights to raise these objections.

The threshold issue is whether this Court may inquire into the validity of the Danzig claims notwithstanding the fact that the claims have been reduced to judgment in the California state court. To resolve the issue, the principle of *res judicata* must be examined.

Under the principle of *res judicata*, a final judgment on the merits in a prior suit involving the same parties or their privies precludes a subsequent suit upon the same cause of action. *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979). *Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or

determined in the prior proceedings. *Brown v. Felsen,* 442 U.S. 127 (1979). As a general rule, in allowing and disallowing claims of creditors, bankruptcy courts are required to give *res judicata* effect to prior judgments of non-bankruptcy courts. *Heiser v. Woodruff,* 327 U.S. 726 (1946).

These general principles of *res judicata* are subject to the bankruptcy court's equitable power to inquire into the validity of claims. In *Pepper v. Litton,* 308 U.S. 295 (1939), the Supreme Court clearly established that the bankruptcy court, in certain situations, may look behind a judgment in deciding whether a claim should be allowed, disallowed or subordinated. Subsequent to that decision, courts have recognized that a bankruptcy court may use its equitable powers to circumvent the effect of *res judicata* only in limited instances. Recognized grounds for challenge of a claim that has been reduced to judgment are that the judgment was procured by fraud or by collusion or that the rendering court lacked jurisdiction. *See, e.g., Kapp v. Naturelle,* 611 F. 2d 703 (8th Cir. 1979) and *In re A-1 24 Hour Towing, Inc.,* 33 Bankr. 281 (Bankr. D. Nev. 1983). Additionally, a change in law between the first and second suits may negate the *res judicata* effect of a case in limited instances. *See, e.g., Parnell v. Rapides Parish School Bd.,* 563 F. 2d 180 (5th Cir. 1977), *cert. denied,* 438 U.S. 915 (1978).

Before the Court considers applying *res judicata* to this case, it must, of course, find that the required elements are present. Here, the Danzig claim is clearly identified as having the same basis as that of the prior state lawsuit. The judgment on the merits in the California suit is final and the parties herein were parties in the California case. Therefore, the stage is set for the application of *res judicata.*

This Court is therefore required to give *res judicata* effect to the California judgment unless one of the re-

cognized exceptions exist. Because the Grynbergs have not asserted that the prior judgment was procured through fraud or collusion, that exception is inapplicable.

The Grynbergs raise, albeit interchangeably, the remaining two exceptions. First, they argue that the bankruptcy court is not precluded from inquiring into the validity of these claims because a jurisdictional challenge has been presented. Yet, even that recognized ground for challenge is restricted. The bankruptcy court remains precluded from inquiring into jurisdictional challenges if the same challenges had been raised in prior proceedings and previously adjudicated. *See Heiser v. Woodruff*, 327 U.S. at 732. Even the issue of lack of jurisdiction may be *res judicata* when it is fully and fairly litigated in a prior action in another forum. *See Underwriters Nat'l Assurance Co. v. North Carolina Life Insurance Assoc.*, 455 U.S. 691 (1982) (where the Supreme Court found that the need for finality applies with equal force to questions of jurisdiction). Therefore, the Grynbergs challenge based on lack of jurisdiction is tenable only to the extent that the issues herein were not previously litigated in the California court.

The record establishes that the California court fully and fairly considered whether the Grynberg's jurisdictional objections were valid. Although the objections to jurisdiction were not interposed until after judgment was originally entered, they were fully considered by the Superior Court through the motion for a new trial. Further, the California Court of Appeals specifically addressed the Grynbergs' jurisdictional objections in its affirmation of the lower court's decision. Because the Grynbergs' objections were fully considered and finally determined in the California courts, the judgment should be entitled to full faith and credit in this court.

The inquiry of the Court would end here if not for the Grynberg's contention that the third exception to *res*

judicata is applicable. The Grynbergs contend that *Phillips*, decided while the application for certiorari to the United States Supreme Court in *Danzig v. Grynberg* was pending, constitutes a change in controlling case law regarding due process requirements in class actions. Thus, the Grynbergs attempt to convince this Court that the *res judicata* effect of the California decision is nullified by the Supreme Court's decision in *Phillips*.

The sequence of events in the *Danzig* appeal is somewhat anomalous. If the *Phillips* case had been decided after the Supreme Court denied certiorari in *Danzig v. Grynberg*, the *Phillips* decision would not preclude the effect of *res judicata* in this claims action. The general rule is that a change in the controlling principles of law after a final judgment ordinarily does not warrant denial of *res judicata*. *See Hardison v. Alexander*, 655 F. 2d 1281 (D.C. Cir. 1981). However, an exception to this general rule has evolved along with the development of certain constitutional principles. That is, a change in law has been found to preclude the application of *res judicata* in cases that raise constitutional issues of broad public importance. *See Precision Air Parts, Inc. v. Avco Corp.*, 736 F. 2d 1499 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 966 (1985) (where the court, after citing several such cases in which an intervening change in law nullified the effect of a prior decision, comments that such cases involve "momentus [sic] changes in important, fundamental constitutional rights," 736 F. 2d at 1504).

Such cases are best exemplified by *Christian v. Jemison*, 303 F. 2d 52 (5th Cir. 1962) *cert. denied*, 371 U.S. 920. In *Jemison*, a challenge was brought to adoption of a city ordinance requiring transportation companies to segregate the seating of white and black passengers. The ordinance was upheld in state court. Three months later the Supreme Court overruled the "separate but equal" doctrine. A second action was permitted to upset the ordi-

nance. The court, in *Jemison*, commented on the "historic" change in constitutional law which rendered *res judicata* inapplicable. Several cases have taken a similar approach in response to evolving principles of voter districting or race discrimination. *See Moch v. East Baton Rouge Parish School Board*, 548 F.2d 594 (5th Cir. 1977), *cert. denied*, 434 U.S. 859 (traditional *res judicata* principle would cause manifest injustice in apportionment case if change in law could not be applied). *See also Griffin v. State Board of Education*, 296 F. Supp. 1178 (E.D. Va. 1969) (*res judicata* not applied to action challenging state support of private schools).

These decisions relying on a change in law to avoid the application of *res judicata* are justified by several factors. First, the intervening law constitutes a substantial change in constitutional rights. Second, the conduct is continuing and would therefore result in the constitution being simultaneously applied differently in different locations. Further, the rights involved are of broad public importance and application of *res judicata* to defeat those rights would overrule a strong public policy or result in manifest injustice.

The circumstances in the case at bar do not mandate the conclusion that *res judicata* would be inapplicable if *Phillips* had been decided when *Danzig* was final. Admittedly, *Phillips* established constitutional limits on multi-state class actions in state courts. The decision requires that notice in a multi-state class action describe the action and plaintiffs' rights in it and requires that plantiffs be given an opportunity to "opt out" of the action. *Phillips*, 105 S. Ct. 2975. Further, regarding the choice of law issue, the court, in *Phillips*, held that a state must have a significant contact or aggregation of contacts with the claims asserted by each member of the plaintiff class before applying the law of the forum state in order to insure that the choice of law is not

arbitrary or unfair. *Phillips*, 105 S. Ct. 2981. These requirements apparently constitute a change from the State law of California at the time of the *Danzig* decision. *See Danzig v. Grynberg*, 161 Cal. App. 3d at 1130 (where the court, in footnote 5, parenthetically rejects the Grynbergs' contentions concerning notice of the remedy of rescission and choice of law).

Yet, even assuming this change in law is a *substantial* change in constitutional rights, that element alone would not be sufficient to mandate departure from the general rule. The conduct involved herein is not continuous as is segregation or voting apportionment. Therefore, the harm of having constitutional rights applied differently in different locations does not appear.

Nor does this Court find the existence of an overriding public policy in this case which would except it from the general principle of *res judicata*. The policy at issue here — class notice and choice of law — does not, in the Court's view, rise to the degree of overall importance in our society which is necessary to avoid the preclusive effect of judgments.

Manifest injustice of the type necessary to except a case from the application of *res judicata* is simply not present here. A mere showing that a second litigation, if allowed to proceed, would require different procedures than the first is not a showing of manifest injustice. Because the doctrine of *res judicata* effects a balance between competing interests, a certain degree of inequity is inevitable. *Res judicata* insures the finality of decisions. It encourages reliance on those decisions, thereby establishing certainty in the legal process. *Brown v. Felsen*, 442 U.S. at 131. Therefore, based on the above factors, if the change in law had occurred when *Danzig* was final, the general rule would prevail here and *res judicata* would apply.

Alternatively, if the *Phillips* decision occurred when the *Danzig* case was on appeal in the California appellate system, it is clear that the appellate courts would have had to apply the law in effect at the time it rendered its decision. *See Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941) and *Fisher v. Berkeley*, 693 P. 2d 261, 37 Cal. 3d 644 (1984) *aff'd* 106 S. Ct. 1045 (1986). Thus, the California courts would have had to consider the effect of *Phillips* on the *Danzig* judgment. If that had occurred, the *Phillips* issue could not be raised again in this Court.

Yet, because the *Phillips* decision occurred when the *Danzig* judgment was pending on application for certiorari and after the California courts had considered it on appeal, these general rules are not directly applicable to this situation. Thus, bearing in mind the general guidelines, this Court must determine the effect of *Phillips* on the Danzig claims. In doing so, it must, of course, also bear in mind that a denial of certiorari imports no expression of opinion on the merits of a case. *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363 (1973).

This Court finds the holdings regarding the effect of a change in law after a final judgment to be determinative of the present case. The change in law occasioned by *Phillips* occurred after the Grynbergs took every advantage of the appeals process in the California state court. The *Danzig* case proceeded through that appeals process and the California court had made its final decision. Only if that decision had been set aside on certiorari would it have been deprived of its conclusive effect. Thus, this Court finds the *Danzig* sequence of events analogous to situations where new decisions alter the law after a final judgment has occurred.

In applying the rules governing the change in law exception, this Court finds that the principle of *res judicata*

is applicable to the Danzig claims. As previously discussed, the Grynbergs' case does not meet the requirements for exception to that rule.

As further support for its decision, this Court notes that a supplemental brief discussing *Phillips* was filed with the United States Supreme Court during the pendency of the Grynbergs' application for certiorari. The Grynbergs, then, had the advantage, which they would not have had if certiorari had already been denied, of submitting the supplemental brief. Therefore, since a change in law would not have nullified the *res judicata* effect of the *Danzig* judgment if that judgment had been final, it should have no effect on the judgment as it was actually postured.

The Grynbergs, given every opportunity to litigate and appeal this case, have cited no persuasive authority or advanced no overriding public policy arguments to convince this Court that *res judicata* should not be applied. Calls for exception to this finality rule must be looked at with circumspection. The Bankruptcy Court, although possessing equitable powers, must abide by the general principles of *res judicata*. As a result, this Court is bound by the final judgment in *Danzig v. Grynberg*, Superior Court No. 462022-4 and the claims based on that judgment must be allowed.

The Grynbergs set forth various additional objections to the Danzig claims. First, the Grynbergs object to the filing of the class claim by Paul Danzig on behalf of the named plaintiffs and all members of the class represented by such named plaintiffs. The Grynbergs assert that the filing of a proof of claim on behalf of a class cannot be allowed.

There is no provision of the Bankruptcy Code or Bankruptcy Rules that specifically authorizes the filing of a proof of claim on behalf of a class. To the contrary, to

allow a representative of a class to file a claim on behalf of others would be inconsistent with 11 U.S.C. § 501 and Bankruptcy Rules 3001 and 3003 and should not be allowed. *See In re Baldwin-Limited Corp.*, 52 Bankr. 146 (Bankr. S.D. Ohio 1985), and *In re Computer Devices*, 51 Bankr. 471 (Bankr. D. Mass. 1985).[2] Thus, the claims of the Danzig class filed as a class proof of claim are disallowed. However, the individual proofs of claim filed by each of the Danzig claimants will be allowed by this Court.

As a further objection, the Grynbergs contend that claimants Louis Stein, Lewis Heicklen and Walter Leventhal have filed duplicative claims. The court file indicates that Louis Stein filed a claim on May 29, 1981 in the amount of $249,873.44 plus interest and filed a claim on July 16, 1981 in the same amount. Both claims are based on the *Danzig* judgment. Similarly, Lewis Heicklen filed two claims, one on July 21, 1981 and one on July 24, 1981. Each of the claims is for $72,304.79 plus interest and each is based on the *Danzig* judgment. The third claimant, Walter Leventhal, also filed two claims, one on July 16, 1981 and one on July 21, 1981. Each claim is for $72,340.79 plus interest and each claim is based on the *Danzig* judgment. This Court shall consider the latter claim of each claimant to be duplicative and shall disallow that claim.

As their final objection, the Grynbergs assert that the claims of claimants Philip Seltzer, Joshua Freedman and Francis Cannon (Seltzer claims) have been fully settled and have been withdrawn pursuant to a settlement agreement relating to these claims. The Danzig claimants argue

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2. Exceptions have been recognized to the disallowance of class proofs of claim. *See, e.g., In re Baldwin-Limited Corp.*, 52 Bankr. at 148. (It may be possible for a class proof of claim to be filed if agency requirements are met by the class representative.)

that although these claims have been settled, this Court should, at this time, supervise disbursement of the sums constituting those claims.

On January 5, 1982, the Bankruptcy Court entered an order approving the settlement of controversies between the Grynbergs and Philip Seltzer (individually and as assignee of Freedman and Cannon). The settlement agreement provided that Seltzer would release the Grynbergs from any interest Seltzer had in the *Danzig* judgment and would pay the Grynbergs a certain amount in cash and transfer certain property rights to the Grynbergs. In return, the Grynbergs agreed to release Seltzer from a judgment entered against him in the United States District Court for the District of Colorado in April of 1978. The law firm of Bancroft, Avery & McAlister, Danzig class counsel, had a lien on a portion of the funds to be released from Seltzer to the Grynbergs under this settlement due to work done while representing Seltzer in the *Danzig* action. Because of such lien, it objected to release of funds without payment of its asserted lien.

The Bankruptcy Court, in its January 5, 1982 order, upheld the law firm's objection. It found that the Grynbergs could not obtain the funds without satisfaction of the law firm's lien and ordered that, although the settlement was approved, the application for release of funds was denied subject to reapplication under terms that complied with the order. This order was affirmed by the District Court for the District of Colorado on February 1, 1983 and affirmed by the Tenth Circuit Court of Appeals on April 9, 1985.

On April 6, 1982, Celeste Grynberg applied to the Court to enter an order permitting withdrawal of Seltzer's proofs of claim provided for in the settlement. On April 7, 1982, an order approving the withdrawal of these claims was entered. No notice of the application to withdraw Seltzer's proofs of claim was given to the *Danzig* class counsel, Bancroft, Avery and McAlister.

Apparently, the funds regarding the settlement between Seltzer and the Grynbergs have never been released. The Danzig claimants assert that the proper procedure would be to allow the Seltzer claims at this juncture and order release of these funds with direct payment of the attorneys' fees to Danzig class counsel. This Court finds that the distribution of those funds is controlled by the January 5, 1982 Order. Upon compliance with the terms of that Order, those funds effected by the settlement may be released.

The Danzig claimants have requested that sanctions be awarded pusuant to Fed. R. Civ. P. 11, Bankruptcy Rule 9011, and 28 U.S.C. § 1927 against counsel for the Grynbergs for interposing the objections to allowance of claims. The claimants argue that the objections are entirely unsupported by law and were interposed to delay payment of these claims and to increase financial hardship on the claimants. Although this Court has allowed the individual claims of the *Danzig* class, it does not find that the Grynbergs' objections to the claims were wholly without merit or were raised for an improper purpose. The Grynbergs have set forth a good faith argument for their position and, therefore, there is no basis for an award of attorneys' fees or costs.

It is ORDERED that the debtors' objections to allowance of the Danzig claims are denied. The claims shall be allowed based on the individual proofs of claim of each member of the Danzig class and the class proof of claim, which is duplicative of the individual proofs of claim filed by the claimants, is disallowed.

FURTHER ORDERED that the duplicative claims of Louis Stein, Lewis Heicklen and Walter Leventhal shall be disallowed.

FURTHER ORDERED that upon compliance with the January 5, 1982 Order of this Bankruptcy Court, the release of funds which are effected by that Order will be allowed.

Dated: July 9, 1986

BY THE COURT:
PATRICIA ANN CLARK, Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO
IN BANKRUPTCY

In re JACK J. GRYNBERG, aka JACK JAKOB GRYNBERG, aka JACK GRYNBERG, dba JACK GRYNBERG AND ASSOCIATES, *Debtor.*	No. 81 B 00821 M
In re CELESTE C. GRYNBERG, aka CELESTE CONSTANCE GRYNBERG, aka CELESTE GRYNBERG, *Debtor.*	No. 81 B 00825 M

JUDGMENT

Pursuant to and in accordance with the Order on Motion for Stay Pending Appeal signed by The Honorable Patricia Ann Clark, United States Bankruptcy Judge, and entered in the bove-entitled matter on August 21, 1986,

IT IS ORDERED AND ADJUDGED that a stay of the July 9, 1986 Order of this Court is denied.

Dated at Denver, Colorado, this 21st day of August, 1986.

FOR THE COURT:

Bradford L. Bolton, Clerk

Yvette R. Harrell, Deputy Clerk

APPROVED AS TO FORM:
Patricia Ann Clark, Judge

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

PAUL DANZIG, LOUIS DEGEN, HAROLD J. GOLDENBERG, ROBERT RUSSELL, AND CARL ZWERNER, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

vs.

JACK GRYNBERG AND ASSOCIATES, A SOLE PROPRIETORSHIP, JACK GRYNBERG, CELESTE GRYNBERG, FIRST DOE THROUGH FIFTIETH DOE, INCLUSIVE,

Defendants.

No. 462022-4

NOTICE OF CLASS ACTION

To: All limited partners of Greater Green River Basin Drilling Program 72-73, a limited partnership:

YOU ARE HEREBY NOTIFIED that the plaintiffs in the above-captioned matter have filed an action in the Superior Court of the State of California, County of Alameda, against Jack Grynberg and Associates, a sole proprietorship, and Jack Grynberg and Celeste Grynberg, individually, in which said plaintiffs assert various claims on behalf of the limited partners of Greater Green River Basin Drilling Program 72-73, a limited partnership.

The action alleges, among other things:

1. That the amendment to the partnership agreement of said partnership adopted in or about September, 1974, and any contribution of additional capital made by limited partners subsequent to adoption of that amendment were invalid and in violation of the original partnership agreement; and that said sums should therefore be reimbursed to the limited partners entitled thereto.

2. That consent to the subject amendment and contribution of additional capital by various limited partners was induced by fraudulent misrepresentations and nondisclosures. Plaintiffs therefore seek rescission of the amendment, restoration of the sums paid pursuant thereto and reallocation of the respective interests of the limited partners in the income, if any, from the wells in question to their pro-rata interests prior to the adoption of the amendment.

3. That those limited partners who contributed additional capital to the partnership under the subject amendment are entitled to repayment of those sums.

4. That various oil and gas leases standing in the names of defendants Jack and Celeste Grynberg, together with all income and profits therefrom, constitute assets of the partnership and should be conveyed to the partnership. Plaintiffs also seek actual and punitive damages on behalf of the limited partnership.

5. That there is a dispute between the general partner and the limited partners as to their respective rights and interests in the assets of the partnership upon termination, and plaintiffs seek a judicial declaration as to the respective rights and interests of the general and limited partners in the assets of the partnership upon termination of the partnership.

6. That the general partner has breached its contractual and fiduciary duties to the limited partners in its conduct of the partnership including, among other things, the allocation of assets, income and expenses between the general and limited partners. Plaintiffs seek an accounting and general and punitive damages on behalf of the limited partners.

The defendants have filed answers in this action in which they deny all of the material allegations of the complaint and have denied any liability.

On February 3, 1976, this Court determined that this action should proceed as a class action on behalf of all persons who are limited partners of Greater Green River Basin Drilling Program 72-73. This Court further determined that the plaintiffs named in the action are proper representatives and may proceed with this action on behalf of the class.

NOW, THEREFORE, TAKE NOTICE:

1. All limited partners of Greater Green River Basin Drilling Program 72-73 will be bound by any judgment entered in this action as to the following issues alleged:

(a) The validity or invalidity of the amendment to the partnership agreement adopted in or about September, 1974.

(b) Whether there should be rescission of the subject amendment on the grounds of alleged misrepresentations and/or nondisclosures in the inducement of the adoption of that amendment.

(c) The rights, if any, of the partnership to certain oil and gas leases standing in the names of Jack and/or Celeste Grynberg.

(d) The respective rights and interests of the limited partners as a group in the assets of the partnership upon termination thereof.

(e) The proper allocation of assets, income and expenses of the partnership between the general and limited partners by virtue of the acts alleged; and the right of the partnership, if any, to actual and punitive damages from the defendants by virtue of the acts alleged in the Complaint.

The determination of these issues will determine rights of the class as a group. You will be entitled to share pro-rata, after deduction for attorneys' fees and disbursements, in any recovery in favor of the class; you will also be bound by any judgment adverse to the class on these issues, or any of them.

If you prefer to be represented by your own counsel with regard to the matters enumerated in paragraph 1 above, whether you favor or oppose the relief sought, or for any other reason, you may enter an appearance in this action through your counsel not later than April 5, 1976. If such appearance is not entered by that date, then your interests as a member of the class which consists of the limited partners of Greater Green River Basin Drilling Program 72-73, will be represented by the plaintiffs in this action and their counsel.

2. You may elect to be excluded from the class with regard to those causes of action (only) which seek repayment of the additional capital paid by various limited partners pursuant to the amendment of September, 1974 (that is, the Third and Fourth Causes of Action only). If you elect to be excluded from the class as to these causes of action, you will be free to pursue on your own behalf whatever legal rights you may have with regard to these issues.

(a) The Court will exclude you from the class as to these causes of action, only, *if* you request exclusion in writing, postmarked on or before March 30, 1976. Persons who request exclusion will not be entitled to share in the benefits of any judgment rendered on these causes of action (only) if that judgment is favorable to plaintiffs, and will not be bound by any judgment rendered on these causes of action (only) if it is adverse to plaintiffs. Requests for exclusion must be sent, in the form attached, to:

Clerk of the Superior Court of
the County of Alameda
1225 Fallon Street
Oakland, CA 94612

(b) If you elect to participate in the class you may be represented either by the plaintiffs herein and their counsel of record or by your own counsel if you prefer; if you elect to be represented by your own counsel, you must enter an appearance through such counsel not later than April 5, 1976.

(c) If you do not file an intention to exclude yourself from the class on these causes of action and do not enter an appearance through counsel of your own choosing by the dates set forth, your interests in these causes of action will be represented by the plaintiffs and their counsel.

(d) If you elect to participate in the class with regard to these causes of action, you will be entitled to share pro rata, after deduction for attorneys' fees and disbursements, in any recovery in favor of the class. You will also be bound by any judgment adverse to the class.

3. This notice is not to be understood as an expression of any opinion by this Court as to the merits of the claims or defenses asserted by either side in this litigation.

/s/ GEORGE W. PHILLIPS, JR.
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

PAUL DANZIG, LOUIS DEGEN, HAROLD J. GOLDENBERG, ROBERT RUSSELL, AND CARL ZWERNER, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

vs.

JACK GRYNBERG AND ASSOCIATES, A SOLE PROPRIETORSHIP, JACK GRYNBERG, CELESTE GRYNBERG, FIRST DOE THROUGH FIFTIETH DOE, INCLUSIVE,

Defendants.

No. 462022-6

REQUEST TO BE EXCLUDED FROM THE CLASS

TO: The Clerk of the Superior Court of the County of Alameda, State of California:

Please take notice that _____
(Print Name)
_____ elects to be excluded
(Print Address)
from the class in the above-captioned matter with regard to the Third and Fourth Causes of Action alleged.

_____
(Signature)

LIST OF RESPONDENTS

Sam Barshop	San Antonio, TX
BBL Associates	Chicago, IL
R. Stephen Berry	Chicago, IL
Alexander Brodsky, M.D.	Houston, TX
Thomas Burke, Jr.	Houston, TX
D. A. Casey	Cheswick, PA
Harvey M. Cohen, M.D.	Denver, CO
Wayne L. Conner, M.D.	Denver, CO
Louis Degen	Denver, CO
Richard S. Dinner	San Francisco, CA
Ernie Foreman, M.D.	Denver, CO
Charles Friedman	Paradise Valley, AZ
N. J. Friedman	San Francisco, CA
Frances Geballe	Woodside, CA
Theodore Geballe	Woodside, CA
Alfred C. Glassell, Jr.	Houston, TX
Emmanuel Goldberg	Rochester, NY
Estate of H. J. Goldenberg	Minneapolis, MN
Rhoda H. Goldman	San Francisco, CA
Richard N. Goldman	San Francisco, CA
Jerome J. Goldstein	Denver, CO
Greater Miami Jewish Welfare Federation	Miami, FL
Evelyn Green	New York, NY
Estate of Mayer Greenberg	Beverly Hills, CA
Peter Haas	San Francisco, CA
Robert M. Hecht	Houston, TX
Lewis Heicklen (Assignee)	Philadelphia, PA
Estate of Louis Honig	San Francisco, CA
Joseph Kanter	Miami, FL

Lucien Katzenberg	Jenkintown, PA
John W. Kelsey	Houston, TX
Mavis P. Kelsey	Houston, TX
Daniel E. Koshland, Jr.	San Francisco, CA
Walter Landor	San Francisco, CA
Richard Lansburgh	Baltimore, MD
Sidney Lansburgh, Jr.	Baltimore, MD
Frank R. Lautenberg	Clifton, NJ
Walter Leventhal (Assignee)	Philadelphia, PA
Ann K. Lenway	San Francisco, CA
Hannah Levy	Denver, CO
Martin J. Lichterman, Sr.	Memphis, TN
Lawrence J. Muller	Hewlett, NY
Margot Parke	Chicago, IL
Madeline H. Russell	San Francisco, CA
Robert Russell	Miami, FL
Peter J. Scott	South Orange, NJ
Louis Stein	Philadelphia, PA
Ivan G. Straus	Chicago, IL
Richard Swig	San Francisco, CA
Martin Walsh	Media, PA
Pauline C. Walsh	Media, PA
Sidney Weinstein, M.D.	West Orange, NJ
C. H. Wilkins	San Francisco, CA
Arnold H. Zidell	San Francisco, CA
Carl Zwerner	Hollywood, FL

No. 89-182

In The

Supreme Court of the United States

October Term, 1988

JACK J. GRYNBERG and CELESTE C. GRYNBERG,

Petitioners,

v.

PAUL DANZIG, et al.,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SANDRA SHAPIRO
BANCROFT AVERY & MCALISTER
Attorneys at Law

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OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

I.

THERE IS NO BASIS FOR GRANTING A WRIT IN THIS ACTION.

1. Petitioners' collateral attack upon the California judgment is barred by *res judicata*.

a. The California judgment is final; this Court denied *certiorari* in the original action.

b. Petitioners had a full and fair opportunity to litigate in the original proceedings all of the issues which they now raise by collateral attack.

c. *Phillips Petroleum v. Shutts* does not provide a basis for collateral attack upon a final state court judgment.

2. The original *Danzig* action did not raise issues similar to those decided in *Phillips Petroleum v. Shutts*.

a. Petitioners did not timely raise any issue of alleged lack of jurisdiction over the members of the plaintiff class or any alleged defect in the class notice in the trial court. Such issues cannot be raised for the first time on appeal from the judgment and cannot be raised by collateral attack upon a final judgment.

b. Each of the class members filed verified answers to interrogatories prior to trial, thereby voluntarily subjecting themselves to the jurisdiction of the California courts.

3. Petitioners waived any claim of denial of due process by failing to assert such claim before the trial

court and failing to object to any alleged defects in the existing class notice before proceeding to trial as a class action.

II.
STATEMENT OF THE CASE

Petitioners herein seek to collaterally attack a final judgment rendered by a California Superior Court in favor of respondents. This is the second time that this case has been brought before this Court on Petition for Certiorari. The original Petition (Docket No. 84-1784) was filed from the judgment entered in the California trial court[1] and affirmed by the California appellate courts.[2] In their original Petition, Grynbergs presented essentially the same arguments as they submit in this current Petition. Indeed, since *Phillips Petroleum v. Shutts* was decided after Grynbergs filed their Petition but before the Court had acted on it, they filed a *"Supplemental"* Petition contending that *Phillips* was applicable to this case and urging a hearing *on that basis*. This Court denied certiorari on October 7, 1985. The California judgment thus became final on that date.

Respondents herein, the members of the plaintiff class to whom the original California judgment had been

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[1] *Danzig, et al. v. Grynberg, et al.*, State of California, Alameda County Superior Court action #4620.2-4 (hereinafter *"Danzig* action" or *"Danzig* judgment").

[2] *Danzig v. Jack Grynberg & Associates* (1984) 161 Cal.App.3d 1128, 208 Cal.Rptr. 336, *cert. den.* 474 U.S. 819 (1985).

awarded (the "*Danzig* claimants")[3], immediately sought allowance of the claims which they had filed in the Grynberg bankruptcy based upon the *Danzig* judgment. Grynbergs objected, seeking to collaterally attack the *Danzig* judgment. The Bankruptcy Court allowed the claims. Grynbergs then appealed that Order to the United States District Court of Colorado, which affirmed, and then to the 10th Circuit, which also affirmed the Order allowing the claims. Thus, as the 10th Circuit pointed out in its opinion:

> "*This court is the seventh forum in which Grynbergs have pursued essentially the same arguments.* The salutary purposes of the doctrine of repose have never been more evident." (Emphasis added.) (10th Cir.Op., A. p. 4.)[4]

To which the *Danzig* claimants, who have now waited more than 9 years since the entry of their judgment to collect the sums found to be owing to them as a result of Grynberg's intentional fraudulent misrepresentations, respectfully say "Amen".

A. History Of The Primary Action.

The *Danzig* claims which are the subject of the Order of the Bankruptcy Court are based upon a judgment

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[3] Each of the *Danzig* claimants had filed individual claims in the Grynberg bankruptcy proceedings based upon their individual allocated shares of the judgment.

[4] The opinions of the District Court (cited as "Dist.Ct.Op.") and the 10th Circuit (cited as "10th Cir.Op.") are set forth in the Appendix to the Petition; citation references to these opinions are to that Appendix.

entered in favor of the *Danzig* claimants in the Superior Court of the State of California, County of Alameda, on December 22, 1980.

The *Danzig* action was initiated by five named plaintiffs on behalf of all limited partners of a limited partnership known as the Greater Green River Basin Drilling Program 72-73 Limited Partnership ("GGRB") against Petitioners herein. Petitioners, as the general partners of GGRB, had represented in the prospectus, and in a summary sheet sent to all limited partners immediately prior to their respective subscriptions to the partnership, that oil and gas leases held in the names of the Grynbergs would be contributed to the partnership and, upon termination thereof, would revert to all of the partners *pro rata*. The limited partners contributed all of the capitalization of the partnership, which was used to maintain and drill the leases and pay management and operational fees to Petitioners. Many of the limited partners contributed additional sums pursuant to a purported amendment to the partnership agreement. The partnership terminated when all of the capitalization was exhausted. Upon termination of the partnership, Grynbergs contended that they were entitled to full reversion of the leases and that the limited partners retained no continuing *pro rata* interest in them.

The initial complaint alleged seven causes of action, as outlined in the Opinion of the Bankruptcy Court. (Record Vol. 1, p. 660.) That complaint specifically alleged the misrepresentations and nondisclosures of Grynbergs with regard to the contribution of the leases.

In December, 1975, *the action was certified as a class action on all causes of action. Notice in a form approved by the court was mailed to all class members. No member of the class opted out of the action.* Three years later, the plaintiff class moved to amend the complaint to assert additional causes of action to rescind the partnership agreement based upon the misrepresentations and nondisclosures of Grynbergs. The amended causes of action were based entirely upon the facts alleged in the original complaint and merely sought alternative forms of relief. The amendment was permitted based on the determination by the law and motion judge that it presented *no* new legal or factual issues; the trial judge also expressly so found when he denied a later motion for continuance of the trial.

Prior to trial, each member of the *Danzig* class, *i.e., each claimant herein,* filed *individual verified* answers to interrogatories propounded by Grynbergs, relating to the factual issues of misrepresentations, nondisclosures and reliance.

The action proceeded to trial in March, 1980, *as a class action without objection,* as the Bankruptcy Court expressly found. (Record Vol. I, p. 661; p. A. 27.) Grynbergs raised *no* objection to any alleged deficiency in the existing notice which had been sent to all members of the class as a result of the amendment nor did they assert any contention or objection to the jurisdiction of the court over the members of the class, by answer to the amended complaint, motion or otherwise. They interposed *no* objection to proceeding to trial on the amended pleadings based on the original class certification and the original notice to the class members, thus affording no opportunity to the

court or the plaintiff class representatives to cure the alleged deficiency prior to trial. Throughout the course of the trial, all parties treated the action as a class proceeding.

After a seven-week trial, the trial judge filed a Statement of Decision in which he found that Grynbergs had induced the subscriptions to GGRB by fraudulent misrepresentations and nondisclosures contained in the prospectus and the written summary sent to each class member. The court therefore ordered rescission of the partnership agreement and amendment as to all class members, restoration of the sums paid by each class member and additional compensatory damages. The court also imposed punitive damages against Jack Grynberg only, based on findings that he had committed the misrepresentations and nondisclosures knowingly and intentionally. Proposed findings of fact and conclusions of law were submitted. Grynbergs filed lengthy objections to the proposed findings and conclusions, but raised *no* objection to the propriety of class adjudication because of any alleged deficiency in the class notice or pretrial certification procedure even at that stage of the proceedings.[5] After lengthy oral argument, the trial court filed its Findings and Conclusions,[6] specifically determining, *inter*

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[5] Grynbergs did object to the adequacy of the *class* representatives.

[6] Petitioners state that the trial court made no finding as to how it had acquired jurisdiction over the absent class members and further made no finding that they had waived their right

(Continued on following page)

alia, that all of the requisites for a class action and a class judgment had been satisfied.

After entry of judgment, Grynbergs filed motions for a new trial. In those motions, Grynbergs claimed *for the first time* that pretrial notice to the class had been inadequate. The motions were briefed at length and vigorously argued. The trial court denied the motions. Grynbergs then appealed the judgment to the California Court of Appeal.

Grynbergs failed to post an appeal bond, as required by California law, and execution was therefore issued. Grynbergs then filed the subject bankruptcy proceedings. Grynbergs' counsel represented to the Bankruptcy Court that the bankruptcy proceedings were filed to prevent execution upon the *Danzig* judgment.

(Continued from previous page)

to assert any alleged deficiency in the class notice. These statements underscore the dissembling nature of Petitioners' claims. Since Petitioners had never contended, and did not contend in their objections to the findings, that the court lacked jurisdiction over any class member, or that there had been any defect or deficiency in the class notice, the court was not required to enter findings on those issues. Indeed, neither the trial court nor the *Danzig* claimants had any knowledge of any such contention. The court *did* find, however, that the class had been properly constituted and certified, and that entry of judgment in favor of the entire class was proper.

Claimants duly filed their respective claims in these proceedings[7] individually and, alternatively, as members of the *Danzig* class[8], based upon the judgment.

On November 21, 1984, the Court of Appeal of the State of California affirmed the judgment of the trial court. (Record Vol. I, p. 538.)[9] The appellate court expressly considered and ruled upon each of the legal issues which Grynbergs raise before this Court as their basis for collateral attack upon the judgment. Specifically, the appellate court held, in accordance with California (and federal) law, that a defendant may not proceed to trial on the merits in an action *which has been certified as a class action and in which notice has been sent to all class members* without objection to the pretrial certification procedure or the form of notice which has been sent to the class and then, if he loses, raise for the first time objections concerning such pretrial procedures which could otherwise have been cured prior to trial. Such objections must be raised *prior* to trial on the merits or are deemed

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[7] The *Danzig* claimants filed their claims based upon their respective interests in the *Danzig* judgment. Each claimant set forth alternative claims based on the original partnership and the misrepresentations made by Grynbergs with regard to solicitation of the investments in the partnership (i.e., the claims raised in the California trial court) in the event the *Danzig* judgment was reversed by the appellate court.

[8] The Bankruptcy Court held the class claim to be inappropriate and disallowed it. The District Court did not rule on that issue since allowance of the individual claims renders the class claim moot. The 10th Circuit similarly did not rule on the propriety of the class claim.

[9] *Danzig v. Jack Grynberg & Associates*, 161 Cal.App.3d 1128, 208 Cal.Rptr 336 (1984), *cert. den.*, 106 S.Ct. 67 (1985).

to have been waived. A Petition for Rehearing was denied. A Petition for Hearing before the California Supreme Court was denied on February 14, 1985.

In each of those petitions Grynbergs again raised the issues which they now raise before this Court for a second time.

Grynbergs then filed a Petition for *Certiorari* before this Honorable Court, again raising each of the issues set forth in their current Petition. While that Petition was pending, *Phillips Petroleum v. Shutts* (1985) 472 U.S. 797 was decided by this Court. Petitioners immediately filed a Supplemental brief before this Court, contending that *Phillips* established that Petitioners had been denied due process, and that *certiorari* should be granted on that ground.

The Petition for Certiorari was denied on October 7, 1985, rendering the *Danzig* judgment absolutely final.

B. History Of This Collateral Proceeding.

Upon denial of *certiorari*, the *Danzig* claimants sought allowance of their claims from the Bankruptcy Court.[10] Petitioners then objected to allowance of the claims, claiming that *Phillips* established that they had been denied due process in the California trial court because a new notice had not been sent to the class members when

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[10] The motion for allowance had originally been filed at an earlier point in time but had been continued until the Petition for Certiorari was decided based on Petitioners' objection that the judgment would not be final until this Court acted.

the complaint was amended.[11] The Bankruptcy Court held that the California judgment was *res judicata* and that no basis existed upon which the judgment could be collaterally attacked; the court therefore ordered that the *Danzig* claims be allowed and paid. Petitioners appealed to the District Court and to the 10th Circuit, each of which affirmed the Order of the Bankruptcy Court.[12]

Petitioners now come before this Court once again, raising the same contentions that they raised in their original Petition from the judgment itself.

III.

THE DANZIG JUDGMENT IS *RES JUDICATA*: IT IS NOT SUBJECT TO COLLATERAL ATTACK BASED UPON THE PHILLIPS DECISION.

A. The Judgment Is Res Judicata.

Each of the federal courts below correctly stated that the basic issue in this proceedings is "whether res judicata applies to the *Danzig* judgment or whether debtors may collaterally attack it." (Dist.Ct.Op. p. A9.) Each court correctly held that the judgment *is res judicata* and is *not* subject to collateral attack. Despite their exhortations,

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[11] Petitioners also raised other contentions which they have now abandoned.

[12] None of these courts concluded that *Phillips* lacked "societal importance", as Petitioners claim. Each court held that the claims raised by Grynbergs did not relate to conduct involving continuing denial of fundamental constitutional rights and thus did not establish a basis for abrogating the doctrine of *res judicata*. (Bankruptcy Court Opinion, pp. A32-35; District Court Opinion, pp. A11-12.)

Petitioners fail to state any cognizable legal basis for denying *res judicata* effect to the judgment.

The *Danzig* judgment is indisputably final; it became final when this Court denied *certiorari* in the primary action:

> "In the instant case certiorari was sought and denied by the Supreme Court of the United States from the judgment of the Supreme Court of Utah. Such denial does not establish the correctness of the particular judgment but *serves only to establish the finality of the judgment as between the particular parties. The same issue cannot be renewed* by initiation of an action in the United States District Court." (Emphasis added.) (*Dairy Distributors. Inc. v. Western Conference of Teamsters* (10th Cir.1961.) 294 F.2d 348, 352.)[13]

A state judgment which is final is *res judicata* and cannot be relitigated. (*Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 326, n. 5; *Dairy Distributors. Inc. v. Western Conference of Teamsters, supra,* 294 F.2d 348, 352, *cert. denied* (1962) 368 U.S. 988); *Baldwin v. Iowa State Traveling Men's Association* (1931) 283 U.S. 522, 524-525. *It is irrelevant whether the claim asserted be predicated in due process or by virtue of an alleged intervening federal right. Final adjudication of the state court action bars subsequent attack upon that*

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[13] Contrary to Petitioners' repeated assertions, none of the courts below concluded that denial of *certiorari* constituted a determination on the merits by this Court and none of those courts based their respective decisions on that assumption. Each of the courts below did conclude, properly, that denial of *certiorari* constituted *this* judgment final between *these* parties, whatever the correctness of that judgment.

judgment. (Underwriters Nat. Assur. Co. v. N.C. Guaranty Assn. (1982) 455 U.S. 691, 705-707; *Kiowa Tribe of Oklahoma v. Lewis* (10th Cir. 1985) 777 F.2d 587, 589-90, *cert. den.* 107 S.Ct. 247 (1986); *Shadid v. Oklahoma City* (10th Cir. 1974) 494 F.2d 1267, 1268; *Deane Hill Country Club, Inc. v. City of Knoxville* (6th Cir. 1967) 379 F.2d 321, 325-326, *cert. denied* (1967) 398 U.S. 975; *Collins v. City of Wichita, Kansas* (10th Cir. 1958) 254 F.2d 837, 839.)

> "State courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts."
>
> (*Deane Hill Country Club. Inc. v. City of Knoxville, supra,* 375 F.2d at 325.)

Challenges to jurisdiction are similarly barred by res judicata if there was an *opportunity* to raise the challenge in the original action. (*Brown v. Felsen* (1979) 442 U.S. 127, 131; *Chicot County Drainage Dist. v. Baxter State Bank* (1940) 308 U.S. 371, 378.)

Thus, even if, *arguendo,* the *Danzig* case had been erroneously decided, and even if, *arguendo, Phillips* changed the law relating to the issues raised in the *Danzig* action, *Grynbergs are still bound by that judgment and cannot raise those issues again in this, or any other, proceeding. (Collins v. City of Wichita, Kansas, supra,* 254 F.2d at 839.)

> "Litigation must end some time, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside." *(Ibid)*

If the issue was litigated and decided in the state court action, as was *each* of the issues raised in Grynbergs' objections, that issue cannot be raised again. On the other hand, if Grynbergs failed to raise an issue in the state court, even though it be based on the federal constitution, they are barred from raising it in a federal action once the state court judgment has become final. (*Brown v. Felsen, supra,* 442 U.S. at 131; *Chicot County Drainage Dist. v. Baxter State Bank, supra,* 308 U.S. at 375, 378); *Tomiyasu v. Golden* (5th Cir. 1966) 358 F.2d 651, 653).

A final state court judgment is *res judicata* in bankruptcy proceedings and entitles the judgment creditor to allowance of his bankruptcy claim based upon that judgment. Once the state court judgment is final, the Bankruptcy Court is barred from relitigating the claim or the issues raised in the state court proceeding. (*Heiser v. Woodruff* (1945) 327 U.S. 726, 733-34, 736; *Teachers Ins. & Annuity Ass'n. of America v. Butler* (2nd Cir. 1986) 803 F.2d 61, 66;[14] *Beneficial Loan Co. v. Noble* (10th Cir. 1942) 129 F.2d 425, 427; *Matter of Novak* (Bkrtcy. D. Conn. 1983) 37 B.R. 31, 33.)

> "[W]e are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata,* which is founded upon the generally recognized public

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[14] "[T]he bankruptcy court should not permit the partnership to relitigate issues already decided [by the trial court], for to allow the partnership to do so, when it knew of the judgment before it filed bankruptcy, *would result in its slipping arguments through the back door that had already been turned away at the front door.*" (*Teachers Ins. & Annuity Ass'n of America v. Butler, supra,* 803 F.2d at p. 66.) (Emphasis added.)

> policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court."
>
> (*Heiser v. Woodruff, supra,* 327 U.S. at 733.)

Petitioners fail to discuss any of these decisions. Rather, they contend that *Kremer v. Chemical Const. Corp.* (1982) 456 U.S. 461 and *Montana v. United States* (1979) 440 U.S. 147 required the 10th Circuit to "look behind" the judgment. Neither case so holds. *Kremer* did not even deal with a collateral attack on a judgment. *Kremer* dealt with an EEOC case in which the plaintiff was entitled to a trial *de novo* in the federal court. However, the federal court dismissed plaintiff's complaint after plaintiff had litigated the dismissal of his claim by the NYS Division of Human Rights through the state courts. The Supreme Court affirmed, holding that the federal courts were required to give "full faith and credit" to the state court proceedings as long as they afforded a full and fair *opportunity* to litigate the issues; *that opportunity constituted the requisite due process*. Thus, the federal courts were precluded from relitigating the issues even in a situation in which plaintiff was otherwise entitled to a trial *de novo* in federal court because he had already had an opportunity to litigate the issues. Grynbergs patently had a "full and fair opportunity" to litigate their contentions before the California courts and *did* fully litigate them.

Petitioners' repeated claims that they did not have the opportunity to raise their present contentions in the trial court are untenable and are refuted by the record. They were at all times represented by competent counsel

who, throughout the almost five years of pretrial maneuvering and discovery, and throughout the seven weeks of trial, raised every contention which they thought might be of strategic benefit to their clients. They contested jurisdiction over the *defendants* through the California appellate courts prior to trial. But they never raised *any* question concerning the court's jurisdiction over the plaintiff class, although they patently had ample opportunity to do so.

As the California courts have repeatedly held, a class action defendant may not gamble on the result of trial and, if the result is adverse, then raise objections which could and should have been raised prior to trial. (*See, e.g., Green v. Obledo* (1981) 29 Cal.3d 126, 147-48, 172 Cal.Rptr. 206, 624 P.2d 256; *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 371-74, 149 Cal.Rptr 360, 584 P.2d 497.) It is irrelevant that *Phillips* had not yet been decided; a party is not denied the opportunity to litigate an issue because the Supreme Court has not yet decided it, and is not permitted to *re*litigate it after the judgment is final. Moreover, Petitioners *did* raise the issue – for the first time – in their motions for new trial, which were argued extensively before the trial court, and before the California Court of Appeal and the California Supreme Court.

Montana is equally inapt. That case dealt solely with the application of the doctrine of collateral estoppel, not res judicata. Moreover, in *Montana*, this Court held that the United States was barred, under the doctrine of collateral estoppel, from relitigating issues in federal court which had been raised by a private party in a state court proceeding. And see *United States v. Moser* (1924) 266 U.S. 236, 242, citing *Montana*:

> "[A] fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action even though the determination was reached upon an erroneous view or by erroneous application of the law." (266 U.S. at p. 242.)

B. Phillips Does Not Constitute A Basis For Collateral Attack Upon The Judgment.

Petitioners cite no authority for the proposition that this Court's decision in *Phillips Petroleum v. Shutts* provided a basis for collateral attack upon a final state court judgment. Even assuming *arguendo*, as Petitioners contend, that *Phillips* established new due process rights for class action defendants, those rights cannot be asserted by collateral attack upon a final judgment. As the District Court stated in response to the cases cited in Grynbergs' brief before that court:

> "A change in the law regarding a constitutional right does not preclude application of *res judicata*, unless continued enforcement of the previously entered judgment would result in the continuation of unconstitutional conduct or preclusion of rights. The cases cited by debtors in which this exception has been applied are not applicable to the case at bar. In *Stanley v. Missouri State Board of Law Examiners*, 616 F.Supp. 142 (D. Mo. 1985), the issue was the continuing preclusion of plaintiff's right to practice law after similar residency requirements had been declared unconstitutional by the United States Supreme Court. The issue was the right of plaintiff to practice law in the future. *See also, e.g., Moch v. East Baton Rouge Parish School Board*, 548 F.2d 594 (5th Cir. 1977), *cert. denied*, 434 U.S. 859 (1977) and *Parnell v. Rapides Parish School Board*,

563 F.2d 180 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1978). (Both cases involved the validity of school reapportionment plans still in use after changes in constitutional standards.) The continuing deprivation of constitutional rights in the above cited cases are distinguishable from the case at bar, involving a money judgment. *No continuing or future conduct is involved in this case. Further, public policies at issue in the above-cited cases, justifying an exception to the principles of res judicata are not present here.* Therefore, an exception to *res judicata* is not applicable." (Emphasis added.) (Dist. Ct. Op. p. A9.)

(*Accord, Chicot County Drainage Dist. v. Baxter State Bank, supra,* 308 U.S. 371, 376; *Douglas Guardian Warehouse Corporation v. Posey* (10th Cir. 1973) 486 F.2d 729, 742-43; *Collins v. City of Wichita, Kansas* (10th Cir. 1958) 254 F.2d 837, 839.)

IV.

PHILLIPS DOES NOT AFFECT THE DANZIG JUDGMENT.

Even if, *arguendo,* the holding of *Phillips* constituted a basis for collateral attack upon a final judgment, that decision does *not* afford any basis upon which to attack the *Danzig* judgment. As the District Court held:

"Even if an exception to the doctrine of *res judicata* were applied, the *Phillips* decision does not require a finding that the *Danzig* judgment should be overturned.

. . .

The *Phillips* decision does not entitle the Grynbergs to a reversal of the *Danzig* judgment." (Dist. Ct. Op. pp. A12-13.)

Phillips did not hold that defendants may proceed, without objection, to trial as a class action in which notice has been sent to all members of the class, and then wait to determine the nature of the judgment before objecting to the adequacy of the notice. Nothing in the *Phillips* decision suggests that it was intended to permit defendants in class actions to withhold pretrial procedural objections until after judgment has been rendered on the merits. *Phillips* requires only that there be minimal due process afforded to class members by giving them notice of the class action. Such due process was surely afforded to the *Danzig* claimants by the class notice that was sent to them as well as by the interrogatories which were sent to each of them and to which each of them responded.

Phillips did not hold that a new notice must be sent to class members each time pleadings are amended in an action that has already been certified and notice sent to the class; no authority supports that contention.

The only cases cited by Grynbergs on this issue (the same cases which they cited to each court in the appellate proceedings from the *Danzig* appeal as well as in this proceedings) are totally distinguishable. In *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.* (D.N.J. 1974) 64 F.R.D. 159, *aff'd.* (3rd Cir. 1976) 530 F.2d 508, *cert. denied* (1976) 429 U.S. 828, the defendant timely requested recertification prior to trial; the amendment had alleged new facts and entirely different causes of action. In *Matarazzo v. Friendly Ice Cream Corp.* (E.D.N.Y. 1976) 70 F.R.D. 556, the objection to existing class certification was also raised prior to trial; the amendment had changed the status, and the potential burdens, of the class members. In *Danzig, no* action was taken by the defendants before the trial court

to request additional notice to the class; and two trial court judges determined prior to trial that the amendment had not introduced new legal or factual issues, but merely asserted additional theories of recovery. Moreover, *neither Zenith nor Matarazzo involved a collateral attack on the judgment*. In each case the defendant brought the issue before the trial court in which the action was pending *prior to trial*. *Phillips* did not hold either that amended pleadings must be recertified and renoticed *or* that a defendant could withhold objections to the adequacy of notice actually given to the class until after entry of judgment. *Phillips* would have required no different result in the *Danzig* action.

Furthermore, in *Danzig, each class member* filed *individual*, verified answers to interrogatories propounded by defendants, an affirmative act which constitutes a *general appearance* under California law and subjected each such party to the *general jurisdiction* of the court.[15] (*Chitwood v. County of Los Angeles* (1971) 14 Cal.App.3d 522, 526; 92 Cal.Rptr. 441.) A state may reasonably determine the nature of the acts which are sufficient to subject a party to the power of its courts. (*Chicago Life Ins. Co. v. Cherry* (1917) 244 U.S. 25, 29-30.) Submission of verified answers to interrogatories is an unequivocal affirmative act subjecting oneself to the general jurisdiction of the court. The *Danzig* claimants each *appeared* before the trial court; there is thus *no* jurisdictional issue, even if Petitioners had raised it in the trial court in the original action.

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[15] Petitioners' argument that if the judgment had been in their favor it would not have been reciprocal is thus incorrect under California law on this ground also.

In addition, each of the individual members of the class appeared generally in actions initiated by Grynbergs in the State of Colorado against all members of the class, individually, after the class action was filed in California. The *Danzig* claimants, as individuals, asserted the priority of the California action in each of those Colorado actions and requested that the actions be stayed pending judgment in the California action.[16] The *Danzig*

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[16] Grynbergs named and served all of the *Danzig* claimants in actions which were filed subsequent to the filing of the complaint in the instant action. (Third party complaint in *Viersen & Cochran Drilling Company v. Jack J. Grynberg, et al.*, U.S. District Court for the District of Colorado, Action No. 77-C-161, in which all of the class members appeared individually; and in *A.J. Carter, et al. v. Jack Grynberg, et al.*, State of Colorado, County of Rio Blanco, Action No. C-2117 which was stayed.) Grynbergs also named the representative plaintiffs in this action as defendants *individually and on behalf of all of the limited partners* in a series of actions which Grynbergs filed in Wyoming and Colorado, all of which were eventually stayed pending resolution of the instant action; Grynbergs did not suggest in any of those actions that service upon the class representatives did not join and bind all of the members of the class. (See, *e.g., Jack Grynberg and Associates, Jack Grynberg and Celeste Grynberg v. Paul Danzig, et al.*: (1) State of Wyoming, District Court of Sweetwater County, Third Judicial District, Action No. 2195; (2) State of Wyoming, District Court of Sublette County, Ninth Judicial District, Action No. 2688; (3) State of Wyoming, District Court of Lincoln County, Third Judicial District, Action No. 5402; (4) State of Wyoming, District Court of Uinta County, Third Judicial District, Action No. 69-1059; (5) State of Wyoming, District Court of Fremont County, Ninth Judicial District, Action No. 18715; (6) State of Wyoming, District Court of Carbon County, Second Judicial District, Action No. 77-C-455; and (7) State of Colorado, District Court of Moffat County, Fourteenth Judicial District, Action No. 3610.)

claimants, as individuals, thus acted continuously and consistently to assert their intent to submit themselves to the jurisdiction of the California court prior to entry of judgment in the *Danzig* action.

V.

PETITIONERS WAIVED ANY OBJECTION TO THE FORM OF NOTICE.

Petitioners contend that they could not waive the alleged inadequacy of the notice to the class; that they had no duty to object to proceeding to trial of the action as a class action if there were a deficiency in the notice to the class; and that the California courts did not adjudicate their due process claims because *Phillips* had not yet been decided. Once again, they fail to cite any applicable authority for their contentions.

It is axiomatic that a party may waive even the most basic due process rights by failing to assert them in a timely manner. (*Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée* (1981) 456 U.S. 656, 702-704; *Fleury v. Harper & Row Publishers, Inc.* (9th Cir. 1983) 698 F.2d 1022, 1029.) Lack of jurisdiction is similarly waived by failing to timely assert an objection and by proceeding before the court; the issue must be raised at the first opportunity. (*Insurance Corp. v. Compagnie des Bauxites, supra,* 698 F.2d at 1029; *cf.* F.R.C.P. 12(h)(1).) As Mr. Miller, one of Grynbergs' counsel on the original Petition for Certiorari, stated to this Court during oral argument in the *Phillips* case:

> "*We were obliged* under the normal rules of assertion of threshold defenses to *make the jurisdictional objection prior to answer and litigate* it, as we

did, in a fully adversarial context."[17] (Emphasis added.) (O.T. p. 9.)

Petitioners did *not* assert their alleged jurisdictional defense at the first opportunity, i.e., after the amendment to the complaint was allowed. They did not assert it before, or even during, trial. They did not raise the issue at all until after judgment was entered. It was then too late. No clearer waiver of the objection could exist.

Petitioners claim they had no duty to object, that under *Phillips* they could stand mute and gamble on the judgment. *Phillips* does *not* so hold. If *Phillips* conferred upon a defendant in a class action the right to have proper notice sent to all class members, then surely it conferred a commensurate duty to object to the failure to send such notice prior to trial or waive the objection, similar to any other procedural due process right. Such rights must be asserted timely or they are waived. Otherwise there would be no finality to any class action judgment. A defendant could simply withhold objections until after trial and then, if the result were adverse, raise an objection to a deficiency *which would have been cured had it been timely asserted*. No authority supports that contention. Such alleged errors cannot be asserted for the first time after entry of judgment; nor can they be raised by way of collateral attack upon the judgment.

California law expressly holds that objections to pretrial class certification procedures must be asserted *prior* to trial or are deemed waived. (*Green v. Obleda, supra*, 29

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[17] The Official Transcript of Proceedings, p. 9, *Phillips Petroleum Co. v. Shutts*, Docket No. 84-233, oral argument on February 25, 1985, is cited as "O.T.".

Cal.3d 126, 147-148, 172 Cal.Rptr. 206, 624 P.2d 256; *Civil Service Employees Ins. Co. v. Superior Court, supra.* (1978) 22 Cal.3d 362, 371-374, 149 Cal.Rptr. 360, 584 P.2d 497.) The federal courts also hold that objections to pretrial certification proceedings may not be raised for the first time after trial. (*See, e.g., Jacklitch v. Redstone Federal Credit Union* (5th Cir. 1980) 615 F.2d 679, 681; *Kelley v. Metropolitan Cty. Bd. of Ed. of Nashville and Davidson Cty., Tenn.* (6th Cir. 1972) 463 F.2d 732, 743, cert. den. (1972) 409 U.S. 1001.) *Phillips* does *not* hold to the contrary, nor is it inconsistent with this basic rule. No denial of due process results from rules which require a party to assert pretrial procedural objections prior to trial.[18]

Grynbergs' argument that the California Court of Appeal did not hold that they had waived their objections to any alleged deficiency in the class notice[19] is a patent misrepresentation. The court specifically held that Petitioners had waived *any* objection to the certification process which they had failed to assert.[20] The court also

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[18] *Young v. Katz* (5th Cir. 1971) 447 F.2d 431, cited by Petitioners, involved a direct appeal from the trial court judgment, not a collateral attack upon a final judgment. These issues *must* be raised in the original action; a party is barred by *res judicata* from raising procedural objections which should have been raised in the original action by way of collateral attack. (*Brown v. Felsen* (1979) 442 U.S. 127, 131; *Chicot County Drainage District v. Baxter State Bank* (1940) 308 U.S. 371, 378.)

[19] Such argument is impermissibly made for the first time in this Court. (*Ellis v. Dixon* (1955) 349 U.S. 458, 460.)

[20] Neither *Aetna Ins. Co. v. Kennedy* (1937) 301 U.S. 389 nor *Fuentes v. Shevin* (1972) 407 U.S. 67, cited by Petitioners,

(Continued on following page)

specifically held that the plaintiff class had received notice of the original certification of the action, which bound the class members to the judgment. As the District Court observed:

> "The California Court of Appeals specifically found that once a class action has been certified, *and notice sent to all class members* (as occurred in the *Danzig* action), *the defendant waives pretrial objections to the adequacy of that notice if he does not assert them prior to the trial.*
>
> . . .
>
> The *Danzig* judgment is not fundamentally unfair to the debtors. The debtors should have raised their objections prior to an adverse adjudication. Once a class action has been properly certified, a defendant may not sit mute, invite pretrial procedural errors, and then raise objections to pretrial procedures only after an adverse decision is reached." (Dist.Ct.Op. p. A16.)

But even if Petitioners' contention were correct, it would have no bearing on their right to *collaterally* attack the judgment.

> "Debtors were not 'precluded' from raising their contentions before the California trial court; they totally failed to raise them until after judgment was entered. Due process rights can be

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(Continued from previous page)

support their position. Neither involved a collateral attack, and neither involved the failure to timely assert a pretrial procedural objection. *Aetna* held that a party had not waived his right to trial by jury by moving for a directed verdict. *Fuentes* held that a debtor who signed an adhesive conditional sales contract had not waived his right to a preseizure hearing.

> waived by a party if not timely asserted. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, 465 U.S. 694, 702-704 (1981). Debtors' claims were fully and fairly heard. The Grynbergs' arguments are an attempt to raise objections before the bankruptcy court and on appeal from the bankruptcy court's decision, by way of a collateral attack on the *Danzig* judgment. These are issues which they failed to assert before the California trial court. This is expressly what the doctrine of *res judicata* prohibits." (Dist. Ct. Op. p. A17.)

The *opportunity* to raise those issues was available to Petitioners and they availed themselves of that opportunity. Due process requires nothing more. (*Kremer v. Chemical Const. Corp., supra*, 456 U.S. 461, 480-481; *Brown v. Felsen, supra*, 442 U.S. 127, 131; *Chicot County Drainage Dist. v. Baxter State Bank, supra*, 308 U.S. 371, 378.)

CONCLUSION

Grynbergs set forth no cognizable ground upon which this Petition should be granted.

The *Danzig* judgment is a final judgment. Claims of deprivation of due process rights, as well as claims of infirmities in jurisdiction, are barred by the doctrine of *res judicata* as long as the petitioners had an opportunity to raise these claims in the original action. Grynbergs had that opportunity; and they did raise their claims in the original action, albeit only after judgment had been entered. The California courts determined that the judgment properly encompassed all members of the class, that all class proceedings, including notice, were adequate,

and that petitioners waived any objections which they might have had by failing to assert them prior to judgment. This Court then denied *certiorari*. Petitioners are absolutely barred from raising those claims again.

Phillips Petroleum v. Shutts provided no basis for collateral attack upon the *Danzig* judgment. Once a judgment becomes final it cannot be attacked on the ground that there has been a subsequent change in the law, or that the issues in the original action were decided incorrectly, even assuming, *arguendo*, that occurred in the instant case.

Regardless, *Phillips* was not applicable to the *Danzig* case. In *Phillips*, the issue of jurisdiction of the state court over the unnamed class members was timely asserted in the trial court; in direct contrast, the issue of alleged deficiencies in the notice which had been sent to class members was not raised until after judgment was entered. Moreover, *Phillips* did not hold that the court must provide new notice to class members if the complaint is amended or lose jurisdiction over them, particularly when the amendment is based entirely on matters already alleged and merely seeks additional remedies. In any event, each class member voluntarily made a general appearance before the California court by filing individual, verified answers to interrogatories, thereby submitting to the jurisdiction of the California trial court.

Grynbergs waived any claim that the notice sent to the members of the class was not adequate by failing to raise any objection prior to trial or entry of judgment, and by proceeding to trial on the original notice. Pretrial

procedural rights are waived unless asserted in a timely manner, or if objection is not made prior to trial.

Grynbergs' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 89-182

In The

Supreme Court of the United States

October Term, 1989

JACK J. GRYNBERG and CELESTE C. GRYNBERG,

Petitioners,

v.

PAUL DANZIG, et al.,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

Page

TABLE OF CASES

OTHER AUTHORITIES

I. Summary of Reply.

Respondents' "Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit" (the "Opposition")[1] (a) relies on matters not contained in the Record and on demonstrably false assertions of fact; and (b) cites no authority which contradicts the Grynbergs' contention that the Circuit Court could not properly accord full faith and credit to the California Judgment without *first* determining that it had been entered in conformity with due process holdings of this Court.

II. The Opposition Relies Upon Matters Not Contained in the Record, Contrary to the Record or Demonstrably False on the Record.

The Opposition, in disregard of Rules 22.1 and 34.5 of the Rules of this Court, virtually ignores the Record. More significantly, material matters on which Respondents state reliance are not in the Record. This Court should not be required to sift through the Opposition to separate record from non-record and truth from contrivance; Respondents' entire factual recitation should be ignored. Certain assertions, however, must be addressed:

A. Respondents state, without reference to the Record, that the trial court found "that all of the requisites of . . . a class judgment had been satisfied" (Opp., p. 7) and

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[1] Respondents' Opposition is cited herein as "Opp." Terms defined in the Petition have the same meaning in this Reply.

that the trial "court *did* find . . . that entry of judgment in favor of the entire class was proper" (*Id.*, at n. 6 (emphasis in original)). These statements are contradicted by the Record, which discloses that the trial court neither made the specific finding urged by Respondents nor made any finding that it had, or how it had acquired, jurisdiction over the Absent Plaintiffs. *See* Petition, pp. 4, 18. The Findings of Fact and Conclusions of Law of the trial court, upon which Petitioners rely (ROA pp. 397-419), is appended hereto as an addition to the Appendix beginning at p. A51.

B. Respondents attempt to dispute the statement of the Petition (p. 6) that the lower courts concluded that *Phillips* lacked "societal importance" (Opp., p. 10, n. 12). The plain meaning of the language quoted by the Petition belies this attempt. *See* App. pp. A34, and *see* A12.

C. Respondents claim that the Petition asserts the same issues as were urged to and decided by the California appellate courts is without factual basis. Opp., pp. 8-9. Because the Grynbergs' principal assertions involve the refusal of the Circuit Court to review the California Judgment in the light of the post-judgment holding of *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985) (*Phillips*), the assertions could not have been made in California and could not have been previously brought to the attention of this Court.

III. Respondents' Contention that Res Judicata Bars Federal Court Review of All State Court Judgments is Patently Erroneous.

The essence of the Opposition, and of its infirmity, is Respondents' remarkable assertion that no state court judgment, even one entered in violation of due process requirements, may be challenged or examined in a subsequent federal proceeding (Opp., p. 13). This claim, and the Opposition, is eviscerated by clear, continuous precedent of this Court, cited in the Petition, that a judgment entered in violation of minimum due process requirements is not entitled to full faith and credit and, as such, is not res judicata. *See* Petition, Sections III A and B.

None of Respondents' authorities disputes the Grynbergs' proposition that no federal court may give full faith and credit to a state judgment without first inquiring into whether controlling legal principles have changed since entry of judgment and proceedings leading to the entry of that judgment satisfied minimum due process. *Montana v. United States*, 440 U.S. 147, 155 (1979), *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 480-481 (1982).

IV. The Opposition and the Lower Courts' Assertions that the Change in Law Enunciated by *Phillips* Need Not be Applied to the California Judgment is Based on a Standard Never Enunciated by any Other Court.

Having asserted the immutability of res judicata as applied to state court judgments, Respondents acknowledged that the District Court, contrary to Respondents'

contentions, recognized that an intervening change in law constitutes an exception to application of that doctrine. Opp., Section III B. The District Court, however, held that a change in constitutional principles, such as enunciated in *Phillips*, "does not preclude application of *res judicata*, unless continued enforcement of the previously entered judgment would result in the continuation of unconstitutional conduct or preclusion of rights." Opp., p. 16 quoting App. p. A11. In requiring federal courts to inquire whether "controlling facts or legal principles have changed significantly since the state-court judgment" before according full faith and credit to that judgment, this Court did not make any such distinction. *Montana v. United States, supra*, 440 U.S. at 155 (1979). *See also, State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154, 163 (1945).

The District Court cited no decision of any Court limiting the impact of constitutional pronouncements to cases in equity. No precedent can be, or was, cited for the proposition that the Bankruptcy, District Court, and Circuit Courts were not bound by *Phillips*. *Phillips* was decided before the judgment at issue was final; before the Bankruptcy Court allowed the claims based upon the California Judgment; and before the District and Circuit Courts affirmed that order. The application of *Phillips* is not optional, it is mandatory. Constitutional rules announced by decisions of this Court, under the Supremacy Clause, are binding upon both state and federal courts. *Henry v. Rock Hill*, 376 U.S. 776, 777 n.1 (1964). "As a rule, judicial decisions apply 'retroactively.' Indeed, a legal system based on precedent has a built-in presumption of retroactivity." *Solem v. Stumes*, 465 U.S. 638, 642 (1984) (citation omitted).

V. Respondents' Claim that Due Process was Satisfied by the Notice and by the Absent Plaintiffs' Responses to Interrogatories Is Refuted by the Record and the Law of the *Danzig* Action.

Respondents assert that "*Phillips* would have required no different result in the *Danzig* action" (Opp., p. 19) because minimum due process "was surely afforded to the *Danzig* claimants by the class notice that was sent to them as well as by the interrogatories which were sent to each of them and to which each of them responded" (*Id.*, p. 18). In fact, Respondents concede that no notice of the 1979 amendments was given. *Id.*, p. 22; the Bankruptcy Judge expressly so found ("No notice of the amendments was given to the Class" (App. p. A27); accord, *Danzig v. Jack Grynberg & Associates*, 161 Cal.App.3d 1128, 1137 n.5, 208 Cal.Rptr. 336, 341 n. 5 (1984)).[2] In the absent of notice, opt out rights were not granted.

Respondents exhibit temerity in relying on responses to interrogatories posed long before the assertion of the Money Damages Claim as a basis for the trial court's jurisdiction over the Absent Plaintiffs. First, Respondents did not designate the interrogatories or the answers as part of the Record and so failed to preserve the contention for review. *Chambers County v. Clews*, 88 U.S. 317, 324 (1874). Secondly, in asserting that responses by Absent

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[2] The 1976 class notice (App. pp. A42-A47) not only fails to provide the "best practicable" notice of the 1979 Money Damages Claim; it describes requests for relief contrary to and exclusive of that Claim. *See Phillips*, 472 U.S. at 812.

Plaintiffs to interrogatories constituted a *"general appearance"* in the case (Opp., p. 19 [emphasis by Respondents]), Respondents fail to apprise this Court of a contrary California appellate decision in which Respondents and their counsel participated. In rejecting an interlocutory appeal by Respondents and compelling interrogatory responses by Absent Plaintiffs, the California Court of Appeal expressly recognized that the Absent Plaintiffs may be simply "persons," not "parties", and rejected the proposition "that unnamed class members stand on the same footing as named parties to whom interrogatories have been propounded." *Danzig v. Superior Court for Alameda County*, 87 Cal.App.3d 604, 612, 151 Cal.Rptr. 185, 190 (1978)[3].

VI. Respondents' Assertion of Waiver Conflicts With and is Not Supported by the Appellate Ruling Affirming the California Judgment.

Respondents' assertion that the Grynbergs waived due process objections to the California Judgment (Opp., Section V) is fatally undermined by Respondents' failure to distinguish between class certification proceedings and post-certification notice proceedings. The former

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[3] Respondents' claim that the Absent Plaintiffs were parties in the California action diametrically contradicts the trial court's findings (App. p. 72 (¶1)) and their strident protestations throughout this case that the *Danzig* action was a proper class action.

have no constitutional import and are not at issue here[4]; under *Phillips*, the latter are necessary to jurisdiction over the Absent Plaintiffs and to the full faith and credit status of the California Judgment and are central to the Petition. *See* Petition, p. 21. None of Respondents' California Rule 23(b)(3) – type authorities holds that a waiver of objections to class certification absolves the need for notice or opt out rights at some time in the case. (Opp., pp. 22-23.) Only when the California Judgment was entered without

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[4] Respondents assert, that by gambling on the result of trial and raising objections only after adverse judgment, the Grynbergs waived their right to object to entry of judgment in favor of the Absent Plaintiffs. Opp., p. 15. Respondents should have advised this Court that, prior to the entry of the California Judgment, the California authority it cites for that proposition does not require a class action judgment in favor of absent plaintiffs in such circumstances:

> Even though a determination of the partial summary judgment issue in its favor *may not have been legally binding on unnotified class members*, defendant assumed that risk by not raising a timely objection to the trial court's resolution of the motion before class notification. As the *Home II* court, [*Home Sav. & Loan Assn. v. Superior Court*, 54 Cal.App.3d 208, 126 Cal. Rptr. 511] noted: "If a defendant chooses to run the risk of *collateral estoppel* on an unfavorable judgment, it is defendant's right to due process that it hazards."

Civ. Serv. Emp. Ins. v. Super. Ct. of City & Cty. of S.F., 22 Cal.3d 362, 375, 149 Cal.Rptr. 360, 367, 584 P.2d 497, 504 (1978) (Emphasis supplied). The risk of *issue preclusion* (collateral estoppel) and judgment in favor of only the named plaintiffs could be a worthwhile gamble; however, a judgment in favor of unnotified persons, or res judicata *claims preclusion*, is a significantly larger risk, one which the Grynbergs were the first to suffer.

notice having been given to the Absent Plaintiffs were the Grynbergs' due process rights violated; only then could the Grynbergs first have objected to that violation. Respondents agree that the Grynbergs timely asserted that objection. Opp., pp. 7, 22.[5]

VII. The Opposition Confirms the importance of The Questions Presented by the Petition.

Rather than rebutting the Grynbergs' reasons for granting their Petition, the Opposition confirms and crystallizes two issues underlying the questions presented to and not previously decided by this Court, making appropriate the granting of the Petition:

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[5] Respondents claim that the Grynbergs' argument that the California Court of Appeal did not hold that they had waived their objections to any deficiency in the class notice is a "patent misrepresentation." Opp., p. 23. The statement alleged to be a misrepresentation is an accurate quotation. *Danzig*, 161 Cal. App. 3rd at 1137, 208 Cal. Rptr. at 341. Respondents also state that the Grynbergs' reliance upon the language of the California appellate court is "impermissibly made for the first time in this Court". Opp., p. 23. The argument complained of is not improperly made – it challenges the Circuit Court holding that the California waiver holding precluded review of the underlying jurisdictional predicate. (App. pp. A3-A4.) That holding was new in this case. *See* Petition, p. 21. In any case, this Court may explore the whole record to determine constitutional issues before it, whatever the parties may argue from that record. *See General Motors Corporation v. Washington*, 377 U.S. 436, 441-442 (1964).

(A) whether, under *Phillips*, notice and opt-out requirements for class action money damages claims differ for, or are not applicable, to claims added by amendment (Opp., p. 18); and

(B) whether a class action defendant has a responsibility under *Phillips* to alert class representatives of the absence of notice to absent plaintiffs of a money damages claim at the risk of waiving the right to object to a judgment entered without such notice (Opp., p. 22).

VIII. CONCLUSION

For the foregoing reasons, this Petition for the issuance of a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be granted, and the case reversed and remanded for further consideration in the light of *Phillips*.

Respectfully submitted,

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Superior Court,
State of California
FOR THE COUNTY OF ALAMEDA

PAUL DANZIG, ET AL.,
Plaintiffs,

vs. **No. 426 022-4**

JACK GRYNBERG & ASSOCIATES, ET AL.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial of the within action commenced on February 14, 1980, before the Honorable Spurgeon Avakian presiding without a jury, the parties having waived trial by jury and stipulated to trial by the Court. Bancroft, Avery & McAlister by Sandra J. Shapiro and Janet Friedman appeared as attorneys for the plaintiff class and Fishman & Geman by William Fishman, Haas & Pahlmeyer by Jason Pahlmeyer, and Neil Ayervais, appeared as attorneys for defendants. Oral and doumentary evidence were introduced, trial briefs were filed and the matter was submitted:

The Court hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. In 1972 defendants solicited the members of the plaintiff class to become limited partners in a proposed

limited partnership to be formed by defendants for the purpose of exploring for oil and gas. Said partnership was to be known as the Greater Green River Basin Drilling Program 72-73, limited partnership (hereinafter "GGR").

2. A partnership agreement for GGR was recorded in the City and County of Denver, State of Colorado on May 12, 1972. Under the terms of the proposed partnership, the general partner was to hold a 50% interest in the said partnership and the income and profits thereof; the limited partners were to hold a 50% interest pro rata in said partnership and the income and profits thereof, in accordance with their respective purchases of limited partnership interests in the partnership. The maximum capitalization of the partnership was specified to be $4,000,000; all of said capitalization was to be contributed by the purchasers of limited partnership interests. Limited partnership interests were sold in units. The price per unit was $200,000. Members of the class purchased either whole units or fractional parts of units.

3. At all times relevant hereto, the general partner of GGR was defendant Jack Grynberg & Associates, a sole proprietorship, owned by defendant Jack Grynberg.

4. At all times relevant hereto, defendants Jack Grynberg and Celeste Grynberg were, and are, husband and wife.

5. At all times relevant hereto, defendants, and each of them, were residents of the State of Colorado.

6. The plaintiff class consists of all of the purchasers of limited partnership interests in GGR. The members of

the plaintiff class, together with the state of residence of each member of the class are identified on Exhibit A hereto, which said exhibit is hereby incorporated herein by this reference.

7. Each member of the plaintiff class purchased a limited partnership interest in GGR. The total subscriptions to GGR by the members of the plaintiff class was $4,000,000. The percentage interest in the limited partnership purchased by each member of the plaintiff class is set forth on Exhibit B, column 1, which said Exhibit is hereby incorporated herein by this reference.

8. Defendants solicited purchases of limited partnership interests from residents of many states including, but not limited to, the State of California. In pursuing said solicitation efforts, defendants traveled to various states, including the State of California, mailed prospectuses and partnership agreements to persons residing in many states, including the State of California, and engaged in telephone conversations with persons in various states, including the State of California.

9. During the course of their sales solicitations, defendants prepared seven successive versions of the prospectus and partnership agreement with regard to GGR. Defendants delivered to each member of the plaintiff class a copy of each successive version of said prospectus and partnership agreement prior to execution of the subscription agreements by which the members of the plaintiff class purchased their respective interest in GGR.

10. The prospectus for GGR constituted part of the partnership agreement.

11. Each successive version of the prospectus and partnership agreement which was sent to each member of the plaintiff class was identical in physical form and format. Various changes were made in each version of the prospectus; most of the changes were not substantive. However, Amendment No. 2 contained a material change in language with regard to the contribution to be made by the general partner in consideration for its interest in GGR. Defendants did not in any way disclose to any member of the plaintiff class that any material change had been made in the language of the later versions of the prospectus describing the contribution which would be made by defendants in return for the general partner's interest in the partnership.

12. Prior to execution of the subscription agreements to GGR by the members of the plaintiff class, defendants caused written summaries of the GGR prospectus and agreement to be sent to each member of the plaintiff class; the summaries purported to summarize and explain the material terms of the partnership.

13. The final versions of the prospectus and agreement are unclear and confusing with regard to the contribution to be made by the defendants in return for the general partner's interest in GGR. The members of the plaintiff class were entitled to rely upon the summaries and the other representations made by the defendants with regard to the contribution to be made by the defendants to the partnership in return for the general partner's interest in the partnership.

14. The members of the plaintiff class justifiably believed that the summaries provided that the oil and gas

leases which were owned by and which were acquired in the Greater Green River Basin by defendants Jack and Celeste Grynberg would be contributed by them to GGR as assets thereof, and that said leases would be distributed pro rata to all of the partners of GGR upon termination of the partnership. The members of the plaintiff class justifiably believed that the summaries correctly and adequately reflected the provisions of the prospectus and partnership agreement. The members of the plaintiff class justifiably relied upon the provisions of the summaries in subscribing to limited partnership interests in GGR and in making their respective contributions to capital of GGR.

15. At the time of the distribution of the summaries to the members of the plaintiff class, defendants knew that the members of the plaintiff class would be likely to be misled by the language of the summaries concerning the true intention of the defendants with regard to the contribution of the subject leases as assets of GGR.

16. The members of the plaintiff class were induced by the acts and misrepresentations of the defendants not to read with care the final versions of the prospectus issued by defendants; and the members of the plaintiff class justifiably relied on the acts and conduct of defendants in failing to ascertain or understand the changes in language which defendants caused to be included in the final versions of the prospectus.

17. At all times prior to execution of their subscription agreements, and at all times prior to making their respective payments for GGR, each member of the plaintiff class justifiably believed that defendants Jack and

Celeste Grynberg would contribute the leases held by them in the Greater Green River Basin, together with all leases subsequently acquired by them in that Basin, to GGR as assets of the partnership, as the contribution of the general partner Jack Grynberg & Associates to said partnership, and that said leases would not revert to said defendants upon termination of the partnership but would be distributed to all partners pro rata.

18. At the time of the solicitations by defendants of the members of the plaintiff class to purchase interests in GGR, and at the time of execution of their respective subscription agreements by the members of the plaintiff class, defendants Jack and Celeste Grynberg owned in excess of 200,000 acres of oil and gas leases in the Greater Green River Basin, located in the States of Colorado, Wyoming and Utah; some of the leases stood of record in the name of Jack Grynberg and some of the leases stood of record in the name of Celeste Grynberg. Said defendants acquired additional leases in said Basin during the term of GGR.

19. Prior to execution of subscription agreements for the purchase of limited partnership interests in GGR by the members of the plaintiff class, the defendants represented to each member of the plaintiff class that in consideration for the money to be contributed by the limited partners, and in consideration for the interest in GGR to be received by the general partner, defendants Jack Grynberg and Celeste Grynberg would contribute all of the oil and gas leases then owned by said defendants in the Greater Green River Basin, and all leases acquired by said defendants, or either of them, in the Greater

Green River Basin during the term of the partnership, to GGR as assets of said partnership.

20. Prior to execution of subscription agreements for the purchase of limited partnership interests in GGR by the members of the plaintiff class, the defendants further represented to each member of the plaintiff class that the said leases owned or to be acquired by the defendants Jack and Celeste Grynberg in the Greater Green River Basin would not revert to said defendants at the termination of the partnership, but would be distributed to all partners pro rata upon dissolution and termination of the partnership. They further represented as an advantage of GGR in contrast with other oil and gas ventures that his avoided any conflict of interest which might otherwise have arisen if leases not chosen by defendants for drilling were to revert to them.

21. At no time did defendants disclose to the members of the plaintiff class that the subject leases would not become assets of the partnership subject to distribution pro rata upon termination thereof, and that defendants did not intend to contribute said leases to GGR as assets thereof; defendants further failed to disclose to the members of the plaintiff class that the subject leases which were not drilled by the partnership would revert to defendants Jack and Celeste Grynberg upon termination of the partnership and that the limited partners would not acquire a pro rata interest in said leases upon termination and dissolution of GGR.

22. At all relevant times defendant Jack Grynberg acted on behalf of defendants Jack Grynberg & Associates and Celeste Grynberg in promoting the subject limited

partnership and soliciting the members of the plaintiff class to purchase limited partnership interests in the subject partnership.

23. At all relevant times defendant Jack Grynberg was acting as the agent of defendants Jack Grynberg & Associates and Celeste Grynberg with regard to the solicitation of purchases of limited partnership interests in GGR by members of the plaintiff class.

24. At the time that the aforesaid representations were made they were untrue, and defendants knew that said representations were untrue; defendant Jack Grynberg knew that the leases of Jack and Celeste Grynberg would not be contributed to the partnership as assets thereof and further knew that the defendants did not intend the subject leases to become assets of GGR; defendants further knew that the defendants did not intend that the subject leases would be distributed pro rata to all the partners upon termination of the partnership, but instead intended that the subject leases, except for those actually drilled by the partnership, would revert solely to defendants Jack and Celeste Grynberg upon termination of the partnership, and that the limited partners would have no interest in said leases.

25. At all relevant times, defendants knew that said misrepresentations and nondisclosures were material to the members of the plaintiff class and that the members of the plaintiff class would rely thereon; and defendants intended that each of said misrepresentations and nondisclosures induce the members of the plaintiff class to purchase limited partnership interests in GGR.

26. Common and similar misrepresentations were made to each member of the plaintiff class.

27. Common and similar nondisclosures were made to each member of the plaintiff class.

28. The aforesaid misrepresentations and nondisclosures were made by defendants to all members of the plaintiff class as part of a common plan and scheme.

29. The aforesaid misrepresentations were material to each member of the plaintiff class in executing subscription agreements to GGR and in making payments for GGR; said misrepresentations would have been material to a reasonable person in the same or similar circumstances as the members of the plaintiff class.

30. The aforesaid nondisclosures were material to each member of the plaintiff class in executing subscription agreements to GGR and in making payments for GGR; said nondisclosures would have been material to a reasonable person in the same or similar circumstances as the members of the plaintiff class.

31. At all relevant times each member of the plaintiff class believed the aforesaid representations to be true.

32. Each member of the plaintiff class was in fact induced to enter into his or her subscription agreement for the purchase of a limited partnership interest in GGR, and, further, to make his or her respective payments for GGR, by each of the aforesaid misrepresentations and nondisclosures.

33. The members of the plaintiff class did not learn the true facts concerning the status of the leases and the

true intentions of the defendants with regard thereto until after they had made all of their payments for GGR.

34. Each member of the plaintiff class justifiably relied upon each of the aforesaid misrepresentations and nondisclosures in purchasing limited partnership interests in GGR and in making their respective payments for GGR; a reasonable person in the circumstances of the members of the plaintiff class at the time of the aforesaid misrepresentations and nondisclosures were made would have relied upon said misrepresentations and nondisclosures in purchasing limited partnership interests in said partnership and making capital payments for GGR.

35. But for the aforesaid misrepresentations and nondisclosures of defendants, the members of the plaintiff class would not have purchased their respective interests in GGR.

36. But for the aforesaid misrepresentations and nondisclosures of defendants, the members of the plaintiff class would not have become limited partners in GGR.

37. But for the aforesaid misrepresentations and nondisclosures of defendants, the members of the plaintiff class would not have paid any of the sums which they in fact paid for GGR.

38. Defendants Jack and Celeste Grynberg both executed a document purporting to assign all of the subject leases to GGR; a copy of said document was sent to each member of the plaintiff class.

39. The subject leases were not in fact assigned or contributed to GGR by defendants Jack and Celeste Grynberg as assets of said partnership.

40. At all relevant times, the subject leases remained of record in the names of Jack and Celeste Grynberg except for such leases as expired or were sold, and with the exception of an assignment of certain leases which contained an express right of reversion of said leases to Jack and Celeste Grynberg upon termination of the partnership.

41. Defendants Jack and Celeste Grynberg did not contribute the leases acquired by them in the Greater Green River Basin during the term of the partnership to GGR as assets thereof; said defendants acquired and retained said leases in their own names.

42. Each of the members of the plaintiff class executed subscription agreements by which they purchased limited partnership interests in GGR.

43. At the time that the members of the plaintiff class executed said subscription agreements, they reasonably believed that the statements contained therein were true.

44. The total sum actually paid by each member of the plaintiff class upon the purchase price of his or her interest in GGR is set forth on Exhibit B hereto, column 2; the dates and amounts of each such payment made by each member of the plaintiff class is set forth in columns 3 and 4 of Exhibit B; said exhibit is hereby incorporated herein by this reference.

45. In 1974, defendants solicited additional capital contributions from the members of the plaintiff class in accordance with a purported amendment to the partnership agreement.

46. Certain members of the plaintiff class made additional capital contributions by virtue of such solicitation. The name of each member of the plaintiff class who made such payments is set forth on Exhibit C. The date of each such payment and the amount of each such payment are set forth on Exhibit C, columns 1 and 2; said exhibit is hereby incorporated herein by this reference.

47. As a direct and proximate result of the aforesaid misrepresentations and nondisclosures, each member of the plaintiff class suffered damage in the amounts paid by each of them as contributions of capital to GGR, in the sums set forth on Exhibit D, column 1, which said exhibit is hereby incorporated herein by this reference.

48. Each member of the plaintiff class suffered, as consequential damages proximately caused by the misrepresentations and nondisclosures of defendants as aforesaid, the loss of the use of the money paid to defendants as contributions to capital of GGR as set forth in Finding No. 47, in an amount equal to 7% per annum from the date of each payment so made. The amounts of such damages suffered by each member of the plaintiff class are set forth on Exhibit B, column 5 and Exhibit C, column 3, which said exhibits are hereby incorporated herein by this reference; the total amount of such damages suffered by each member of the plaintiff class to the date of judgment herein is set forth on Exhibit E, column 2, which said exhibit is hereby incorporated herein by this reference.

49. Alternatively, each member of the class is entitled to interest upon the sums paid by each such member of the class as contributions to capital of GGR at the rate

of 7% per annum from the date of each payment so made; the sums to which each member of the plaintiff class is so entitled are set forth on Exhibit B, column 5 and Exhibit C, column 3; the total amount of such interest is set forth on Exhibit E, column 2, which said exhibits are hereby incorporated herein by this reference.

50. The representations and fraudulent non-disclosures committed by defendant Jack Grynberg were intentionally made by said defendant.

51. In committing the acts, misrepresentations and nondisclosures set forth above, defendant Jack Grynberg acted wilfully, intentionally, maliciously and with a wanton and reckless disregard for the rights of the members of the plaintiff class.

52. By virtue of the wilful, intentional, fraudulent and malicious acts of defendant Jack Grynberg, as aforesaid, each member of the plaintiff class is entitled to punitive damages from said defendant in a sum equal to 10% of the principal amount paid by each said plaintiff as contributions to capital of GGR; the amount of punitive damages to which each said member of the plaintiff class is so entitled is set forth on Exhibit E, column 3, which said exhibit is hereby incorporated herein by this reference.

53. The only sums received by the members of the plaintiff class from defendants with regard to GGR were certain distributions of a portion of the income received by GGR from certain producing wells; the sums so received by each member of the plaintiff class are set forth on Exhibit D, column 2, which said exhibit is hereby incorporated herein by this reference.

54. The members of the plaintiff class received no sums or benefits by virtue of their purchase of their respective interests in GGR other than the sums set forth in Finding No. 53.

55. Defendants can and will adequately be restored to the *status quo ante* by transfer to them of all of the assets of GGR, and an offset against the sums to be repaid by defendants to plaintiffs of the sums set forth in Finding No. 53.

56. Defendants received benefits from the use of the funds paid by the members of the plaintiff class as contributions to capital of GGR.

57. The leases of defendants Jack and Celeste Grynberg in the Greater Green River Basin were benefitted by the sums contributed by the members of the plaintiff class for GGR.

58. Upon termination of the term of GGR, defendants asserted complete dominion and control over all of the leases which defendants had represented would become assets of GGR with the exception of certain leases located in producing prospects. Defendants further asserted that all said leases had reverted to defendants Jack and Celeste Grynberg. At all times after the date provided in the partnership agreement for dissolution of GGR, defendants Jack and Celeste Grynberg have treated the said leases as their sole property and have dealt with said leases as their property.

59. The members of the plaintiff class did not unreasonably delay assertion of their claims for fraud after learning the true facts.

60. Defendants would not have acted in any different manner nor would defendants have done anything differently nor would there have been any change in circumstances if the plaintiff class had asserted its claim for rescission of the partnership agreement at an earlier time.

61. Defendants did not suffer any prejudice by virtue of the fact that the plaintiff class first asserted its claim for rescission of the partnership agreement in their Amendment to the Complaint herein.

62. The members of the plaintiff class did not engage in acts which were inconsistent with their right to rescind the partnership agreement after they acquired knowledge of the aforesaid misrepresentations and nondisclosures.

63. On February 8, 1977, Viersen & Cochran Drilling Company, the firm which did the drilling on the first Kent well, filed an action against Jack J. Grynberg, doing business as Jack Grynberg & Associates in the United States Federal Court for the District of Colorado, being action number 77-M-161 in the records of said Court. On July 5, 1977, defendant Jack Grynberg filed a third party complaint in that action against certain members of the plaintiff class. That third party complaint was dismissed by the district court on procedural grounds; there was no trial on the merits of any issue raised by the third party complaint. The Order of dismissal was appealed to the Tenth Circuit and was reversed by that Court by opinion dated September 10, 1979.

64. The decision rendered by the Tenth Circuit on the appeal by Jack Grynberg & Associates from the

aforesaid Order of Dismissal of said third party complaint in said action was not a decision rendered on the merits.

65. The Tenth Circuit did not decide, nor was any issue presented to that court with regard to, whether the partnership agreement of GGR was valid or enforceable against the limited partners or was subject to rescission by virtue of the misrepresentations and nondisclosures made to the limited partners which had induced them to purchase interests in said partnership.

66. Defendants voluntarily engaged in substantial activities within the State of California in the course of soliciting execution of subscription agreements and contributions to capital of GGR.

67. Representatives of defendants personally came to California to solicit purchases of limited partnership interests in GGR.

68. Defendants registered the prospectus and partnership agreement for GGR with the Commissioner of Corporations of the State of California; the prospectus registered with the Commissioner of Corporations expressly states that defendants Jack and Celeste Grynberg are owners of the aforesaid oil and gas leases.

69. More residents of California purchased limited partnership interests in GGR than residents of any other state; more residents of California are members of the plaintiff class than residents of any other state.

70. Defendants sold more partnership interests in the State of California than in any other state; seventeen of the original fifty-two purchasers of limited partnership

interests are residents of the State of California; the next largest number of original purchasers by state of residence is six from the State of Texas and six from the State of Pennsylvania; the next largest number of original purchasers by state of residence is four from the State of Colorado. One of the representative plaintiffs, Paul Danzig, is a resident of the County of Alameda, State of California.

71. All of the California residents who are members of the plaintiff class were solicited to purchase their respective partnership interests within the State of California; and each such California resident executed his or her subscription agreement within the State of California.

72. All limited partners in GGR are members of the plaintiff class; the membership of the class was at all time clearly ascertainable.

73. The claims of the representative plaintiffs in this action are typical of the claims of all members of the plaintiff class. The representative plaintiffs adequately represented the members of the plaintiff class in this action.

74. The issues of law and fact upon which this action is based are common to all members of the class; there is a well defined community of interest among members of the class in the issues of law and fact adjudicated in this action.

75. After commencement of the within action, certain members of the plaintiff class entered into agreements (Tr. Exs. 391) with defendants Jack Grynberg & Associates and Jack Grynberg for the purpose of drilling

three wells on leases in the Dragon Trail Prospect, which said leases were among the leases in dispute in this action; the wells drilled under those agreements are commonly referred to as Wells number 24-6, 44-6 and 44-29. Said agreements were approved by Orders of this Court. Pursuant to the provisions of those agreements, the members of the plaintiff class who entered into the said agreements did not thereby waive any right or claim to which said persons were entitled in this action.

76. Each participant in the drilling of the subject wells, other than defendants Jack Grynberg and Jack Grynberg & Associates, was required to pay a pro rata share of one-half of the expenses up to a total cost of $170,000.

77. The names of the limited partners who agreed to participate in the drilling of Well 24-6 are set forth on exhibit F, Column 1; the percentage of the limited partners' 50% share of costs up to $170,000 of well 24-6 to which each such participant subscribed is set forth in Exhibit F, Column 2; the amount paid by each limited partner participant in well 24-6 as of December 31, 1979 is set forth on Exhibit F, column 3, which said exhibit is hereby incorporated herein by this reference.

78. The names of the limited partners who agreed to participate in the drilling of Well 44-6 are set forth on Exhibit G, Column 1; the percentage of the limited partners' 50% share of costs of well 44-6 to which each such participant subscribed is set forth in Exhibit G, Column 2; the amount paid by each participant in well 44-6 as of December 31, 1979 is set forth on Exhibit G, column 3,

which said exhibit is hereby incorporated berein by this reference.

79. The names of the limited partners who agreed to participate in the drilling of Well 44-29 are set forth on Exhibit H, Column 1; the percentage of the limited partners' 50% share of costs of well 44-29 to which each such participant subscribed is set forth in Exhibit H, Column 2; the amount paid by each participant in well 44-29 as of December 31, 1979 is set forth on Exhibit H, column 3, which said exhibit is hereby incorporated herein by this reference.

80. The outstanding accounts payable to entities other than defendant Jack Grynberg & Associates for well 24-6 are set forth on Exhibit J, which said exhibit is hereby incorporated herein by this reference.

81. The outstanding accounts payable to entities other than defendant Jack Grynberg & Associates for well 44-6 are set forth on Exhibit K, which said exhibit is hereby incorporated herein by this reference.

82. The outstanding accounts payable to entities other than defendant Jack Grynberg & Associates for well 44-29 are set forth on Exhibit L, which said exhibit is hereby incorporated herein by this reference.

83. The outstanding accounts payable to defendant Jack Grynberg & Associates, including both amounts originally billed by defendant Jack Grynberg & Associates, which are proper charges, and amounts originally billed by other entities which have been paid by defendant Jack Grynberg & Associates for well 24-6, are set

forth on Exhibit M, which said exhibit is hereby incorporated herein by this reference.

84. The outstanding accounts payable to defendant Jack Grynberg & Associates, including both amounts originally billed by defendant Jack Grynberg & Associates, which are proper charges, and amounts originally billed by other entities which have been paid by defendant Jack Grynberg & Associates for well 44-6, are set forth on Exhibit N, which said exhibit is hereby incorporated herein by this reference.

85. The outstanding accounts payable to defendant Jack Grynberg & Associates, including both amounts originally billed by defendant Jack Grynberg & Associates, which are proper charges, and amounts originally billed by other entities which have been paid by defendant Jack Grynberg & Associates for well 44-29, are set forth on Exhibit O, which said exhibit is hereby incorporated herein by this reference.

86. The total cost of drilling well 24-6, based on the invoices approved for payment by defendant Jack Grynberg & Associates, with the exception of a charge of $2,304 for Jack Grynberg's time, which is not properly chargeable, was $217,917.44.

87. The total amount to be paid by each member of the plaintiff class who agreed to participate in well 24-6 as his pro rata share of $170,000 is set forth in Exhibit I, Column 2, which said exhibit is hereby incorporated herein by this reference.

88. The total costs of drilling well 44-6, based on the invoices approved for payment by defendant Jack Grynberg & Associates, with the exception of a charge of $2,304 for Jack Grynberg's time, which is not properly chargeable, is $132,146.16.

89. The amount payable by each member of the plaintiff class who agreed to participate in well 44-6 as his pro rata share of $132,146.16 is set forth in Exhibit I, Column 3, which said exhibit is hereby incorporated herein by this reference.

90. The total cost of drilling well 44-29 based on invoices approved for payment by defendant Jack Grynberg & Associates, less $2,304 for Jack Grynberg's time which is not properly chargeable, is $113,752.39.

91. The total contribution required of defendants Jack Grynberg and Jack Grynberg & Associates to the escrow for drilling well 24-6 was 54.006% of costs up to $170,000, and all costs over $170,000, which said sum is set forth on Exhibit I, column 2, which said exhibit is hereby incorporated herein by this reference.

92. The contribution required of defendants Jack Grynberg and Jack Grynberg & Associates to the escrow account for drilling well 44-6 is 52.851% of total costs, which said sum is set forth on Exhibit I, column 3, which said exhibit is hereby incorporated herein by this reference.

93. The contribution required of defendants Jack Grynberg and Jack Grynberg & Associates to the escrow for drilling well 44-29 is 52.5% of total costs.

94. Defendants Jack Grynberg & Associates and Jack Grynberg have contributed $65,000 to the escrow for drilling well 24-6; defendants Jack Grynberg & Associates and Jack Grynberg have contributed $30,000 to the escrow for drilling well 44-6; defendants Jack Grynberg & Associates and Jack Grynberg have contributed $68,251 to the escrow for drilling well 44-29.

95. The escrow agents are entitled to collect the sums due from the participants in wells 24-6 and 44-6 as set forth in Exhibit I, columns 2 and 3, less amounts previously paid, and pay from the escrow accounts for those wells the accounts payable set forth in Exhibits I,J,K and M, which said exhibits are hereby incorporated herein by this reference.

96. The escrow agents are entitled to pay the accounts payable for well 44-29 set forth on Exhibits L and O and refund any funds remaining in the escrow account to the participants, in proportion to their participation in the escrow, as set forth in Findings 79 and 93.

97. If any Finding of Fact set forth herein is determined to be a Conclusion of Law rather than a Finding of Fact, then it shall be deemed to be a Conclusion of Law.

Conclusions of Law

1. The within action is a proper class action on behalf of the plaintiffs; the plaintiff class constitutes a proper and appropriate class.

2. This Court has jurisdiction over each of the defendants herein and over the subject matter of the within action.

3. The GGR prospectus was part of the GGR partnership agreement.

4. The final GGR prospectus and partnership agreement are ambiguous with regard to the contribution to be made by the defendants to the partnership.

5. Defendants made common, material, and fraudulent misrepresentations and nondisclosures to all members of the plaintiff class with the intention of inducing them to subscribe to limited partnership interests in GGR and to make contributions of capital to GGR. Each member of the plaintiff class justifiably relies on such misrepresentations and nondisclosures in purchasing their respective interests in GGR and making their respective contributions to capital of GGR.

6. The members of the plaintiff class were induced to enter into their respective purchases of limited partnership interests in GGR and to make their respective contributions to capital of GGR as a direct and proximate result of common fraudulent misrepresentations and nondisclosures of the defendants.

7. The members of the plaintiff class were entitled to rescind their respective agreements to purchase limited partnership interests in GGR.

8. As a direct and proximate result of each of the fraudulent misrepresentations of defendants, and each of them, the members of the plaintiff class were damaged in the amounts paid by each said member, respectively, as capital payments to or for the subject partnership in the total sum of $4,109,198.39; the damage so suffered by each member of the class is set forth on Exhibit E, column

1, which said exhibit is hereby incorporated herein by this reference.

9. As a further direct and proximate result of each of the fraudulent misrepresentations and nondisclosures of defendants, and each of them, the members of the plaintiff class suffered additional compensatory damages in the sum of $2,202,714.47; damages so suffered by each member of the plaintiff class is set forth on Exhibit E, column 2, which said exhibit is incorporated herein by this reference.

10. The members of the plaintiff class are each entitled to payment from the defendants of the sums paid by each member of the plaintiff class as their respective contributions to the capital of GGR as set forth on Exhibit D, column 1, which said exhibit is hereby incorporated herein by this reference.

11. Defendants are entitled to restoration from the members of the plaintiff class, as an offset against the sums payable by defendants to said plaintiffs as set forth in Conclusion No. 10, of the sums distributed to said plaintiffs from GGR, as set forth on Exhibit D, column 2, which said exhibit is hereby incorporated herein by this reference.

12. The members of the plaintiff class are each entitled to judgment against defendants for the sums set forth in Exhibit E, column 1, which said exhibit is hereby incorporated herein by this reference.

13. Each member of the plaintiff class is entitled to judgment for additional damages against defendants in

the sums set forth on Exhibit E, column 2, which said exhibit is hereby incorporated herein by this reference.

14. The acts and conduct of defendant Jack Grynberg in inducing the members of the plaintiff class to purchase limited partnership interests in GGR were fraudulent, intentional and malicious.

15. Each member of the plaintiff class is entitled to recover punitive or exemplary damages from defendant Jack Grynberg in the sum set forth on Exhibit E, column 3, which said exhibit is hereby incorporated herein by this reference.

16. The members of the plaintiff class are not indebted to defendants, or any of them, for any sums arising out of the GGR partnership.

17. Defendants are entitled to all assets and property of GGR.

18. The members of the plaintiff class did not affirm the partnership contract after acquiring knowledge of the facts constituting the basis for rescission of said agreement.

19. The members of the plaintiff class, individually and collectively, were not guilty or laches in their assertion of their claim for fraud nor in their assertion of their claim to rescind the partnership agreement.

20. The members of the plaintiff class, individually and collectively, are not estopped from asserting their claim to rescission and damages in the within action.

21. The members of the plaintiff class, individually and collectively, did not waive their rights to claim rescission and damages in the within action.

22. The members of the plaintiff class, individually and collectively, did not have unclean hands with regard to the transactions involved in the within action.

23. The members of the plaintiff class, individually and collectively, were not negligent in their conduct in entering into their respective subscription agreements, or in relying upon the representations and nondisclosures of the defendants with regard thereto.

24. California has a strong governmental interest in applying its law to the facts of the instant case.

25. No governmental interest of the State of Colorado will be impaired by applying California rather than Colorado law to the issues or remedies herein; there is a lesser impairment of the governmental policy of the State of Colorado if the law of California is applied to the issues or remedies of the within action than the impairment to California governmental policy if the law of Colorado were applied.

26. No other state has a strong governmental interest which would be impaired by the application of California law to the issues of the within action.

27. California law is the proper law to be applied to the issues of the within action.

28. Those limited partners who participated in the agreements for the drilling of wells 24-6, 44-6 and 44-29, as set forth on Exhibit I hereto, are obligated to pay to the escrow holders for said wells the total sums set forth on

Exhibit I, columns 2 and 3 to the extent not already paid, which said exhibit is hereby incorporated herein by this reference.

29. Defendants Jack Grynberg and Jack Grynberg and Associates are obligated to pay to the said escrow holders the sums set forth on Exhibit I, columns 2 and 3, to the extent not already paid, which said exhibit is hereby incorporated herein by this reference.

30. The escrow holders shall pay all obligations listed on Exhibits J, K, L, M, N and O upon receipt of the funds from all escrow participants as aforesaid, which said exhibits are hereby incorporated herein by this reference. Defendants Jack Grynberg and Jack Grynberg & Associates are solely liable for any and all other debts or expenses chargeable to or arising from the drilling of wells 24-6, 44-6 and 44-29.

31. Defendants Jack Grynberg and Jack Grynberg & Associates are solely liable for any costs of drilling any of wells 24-6, 44-6 and 44-29 in excess of those set forth in Findings 86, 88 and 90.

32. If any Conclusion of Law set forth herein is determined to be a Finding of Fact rather than a Conclusion of Law, then it shall be deemed to be a Finding of Fact.

Dated: December 18, 1980

/s/ SPURGEON AVAKIAN
JUDGE OF THE SUPERIOR COURT